Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

RICHARD A. MOECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Wisconsin Supreme Court contravene *Arizona v. Washington*, 434 U.S. 497 (1978), when it held that the Double Jeopardy Clause prohibits the retrial of a defendant whose prior trial ended in a mistrial declared, over his objection, in response to an improper opening statement by defense counsel?

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OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is set forth in the Appendix (A1-62) and is reported at 695 N.W.2d 783. The opinion of the Wisconsin Court of Appeals is set forth in the Appendix (A63-74) and is reported at 677 N.W.2d 648.

The trial court's oral decision declaring a mistrial is set forth in the Appendix (A85-92). The trial court's written decision denying respondent's motion to dismiss on double jeopardy grounds is set forth in the Appendix (A93-96).

JURISDICTION OF THIS COURT

The State of Wisconsin seeks review of a final decision of the Wisconsin Supreme Court, rendered May 6, 2005. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]

INTRODUCTION

In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court addressed a recurring problem facing trial judges: how to remedy an improper opening statement by defense counsel in a criminal case. The Court had long held that the Double Jeopardy Clause does not bar a retrial following a mistrial founded upon "manifest necessity." *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). But what is a trial judge to do if he or she believes that no instruction to the jury can cure the improper opening statement, yet fears declaring a mistrial because an appellate court may disagree that the improper statement made mistrial a "manifest necessity"? If that occurred, the Double Jeopardy Clause would bar a retrial and the defendant would walk free thanks to his own counsel's misconduct.

The Court solved this problem in *Arizona v. Washington*, where it held that "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference." *Id.* at 514. Such deference is warranted by "compelling institutional

considerations," most notably that "he is far more conversant with the factors relevant to the determination than any reviewing court can possibly be." *Id.* at 513, 514 (internal quotation marks and citation omitted). This holds especially true, stated the Court, where the error prompting the mistrial was an improper opening statement by defense counsel. A trial judge's determination that a mistrial is warranted based on such conduct "is entitled to special respect." *Id.* at 510.

The Wisconsin Supreme Court, in the decision below, blatantly disregarded this Court's instruction. Instead, it held that the Double Jeopardy Clause barred the retrial of a defendant whose prior trial ended in a mistrial because his counsel presented the defendant's entire account of events in his opening statement, but then failed to offer *any* evidence to back up that account. (Counsel mistakenly assumed that the defendant would testify.) Far from giving the trial court "great deference" or "special respect," the Wisconsin Supreme Court reversed based on its own independent belief that a curative instruction and the State's closing argument could have remedied defense counsel's enormous error.

Unfortunately, the Wisconsin Supreme Court is not the only court that is failing to grant trial judges the deference required by *Arizona v. Washington*. Numerous federal and state courts have given little or no deference to trial judges' declarations of mistrial. This Court should grant certiorari to preserve the discretion it has granted trial courts and to prevent criminal defendants from escaping any punishment for their actions based on their own counsels' errors.

STATEMENT OF THE CASE

The State of Wisconsin charged Richard Moeck with various offenses arising out of an encounter between himself and the victim, Chris Sader, at Moeck's apartment in the early

morning hours of August 2, 1997. The victim testified that Moeck repeatedly assaulted him physically and sexually, and robbed him, during the several hour ordeal.

Moeck's first trial ended in a deadlocked jury and a mistrial was declared. Moeck did not challenge that mistrial declaration. Moeck and the victim both testified and were cross-examined. App. A3, ¶7.

Moeck's second trial ended in a jury's guilty verdict and conviction on all counts. Moeck and the victim again both testified and were cross-examined. Moeck's conviction, however, was reversed by the Wisconsin Court of Appeals. The court of appeals held the trial judge committed reversible error when he inadvertently referred during *voir dire* to the fact that Moeck was charged as a repeat offender. Although the judge immediately gave a curative instruction, the court of appeals held that he should have declared a mistrial instead. App. A3, ¶8.

Moeck's third trial ended in the mistrial declaration upon which the present controversy is based. App. A3, ¶9. The State's request for a mistrial, and the trial court's order, resulted from defense counsel's opening statement to the jury. In his opening statement, defense counsel summarized in detail his client's anticipated exculpatory testimony and corresponding attack on the victim's credibility and character. Counsel also referred liberally to his client's testimony in the two previous jury trials. *See* App. A75-A85.[1]

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[1] The key passage is as follows:

> On this morning, ladies and gentlemen, what happened, Rich [Moeck] is asleep in his apartment. [C.S.] [the victim] knocks on the door. . . . [C.S.] comes to Rich's apartment with marijuana looking to sell marijuana that night to Rich. He also asks if he can crash at his place

(footnote continued)

The State then presented its case. The victim testified and was subjected to cross-examination. After the State rested, defense counsel announced that Moeck decided not to testify. At this point, the prosecutor requested a curative instruction to diminish the prejudice from the now unsubstantiated opening statement. Counsel and the court then discussed how such an instruction might be worded. The prosecutor also asked what, if any, closing argument she could present to the jury in response. The prosecutor was concerned that she ran the risk of crossing the line into improper comment on Moeck's right not to testify if she referred to counsel's failure to substantiate his argument with Moeck's testimony. *See*

> and, in fact, he does spend the evening at Rich's apartment. . . .
>
> The next morning they wake up and they discuss this marijuana and Rich says, well, I only want 20 or $30 worth. Rich then goes out into the hallway where the bathrooms are. He doesn't have a bathroom in his apartment. It's out in the hallway. He goes out there. He comes back in, and he notices that the money that was on the counter is now gone. It's missing, and he asks [S.], well, where's the money, and [S.] denies, well, I don't have the money. And he says, where's the money, and finally [S.] says, okay, I've got it, and he pulls it out of his sock and gives him his money. At that point Rich is mad and he kicks and pushes him out of the apartment, kicks him out of the building, out the back fire door which is just outside of his apartment door.
>
> At that point [S.] is gone. Rich goes back into his apartment, grabs something to eat, goes back to sleep, and then he's awakened at 11 or a little after 11 o'clock by the police that morning and they execute a search warrant and Rich is arrested.
>
> And that story, ladies and gentlemen, is the only story that's been consistent throughout this case.

App. A15-16, ¶46. *See also* App. A75-76.

Griffin v. California, 380 U.S. 609 (1965). The court recognized this problem and concluded that "the State under the circumstances now would be entitled to a mistrial if they wanted one." App. A90. After further deliberation, the prosecutor requested a mistrial, which the court granted. *See* App. A85-92.

The trial court denied Moeck's motion to dismiss before the start of the fourth trial on double jeopardy grounds. App. A93-96. The Wisconsin Court of Appeals granted his petition for interlocutory appeal, but summarily affirmed. In doing so, it deferred to the trial judge's exercise of discretion to declare a mistrial. App. A3-4, ¶11, and App. A38-39, ¶¶109-112 (Prosser, J. dissenting).

Moeck's fourth trial ended with a jury verdict convicting him of two counts of first degree sexual assault, one count of false imprisonment, one count of robbery, and one count of intimidation of a witness. He was sentenced to a total of 161 years in prison on the several offenses.

On direct appeal, the Wisconsin Court of Appeals rejected Moeck's petition for a writ of habeas corpus. App. A4, ¶13 and App. A39-40, ¶114 (Prosser J. dissenting). The trial court denied Moeck's subsequent collateral motion for postconviction relief, which asserted, *inter alia*, that his fourth trial violated the Double Jeopardy Clause. App. A4, ¶14. The Wisconsin Court of Appeals reversed, holding that Moeck's conviction was obtained in violation of his right to be free from double jeopardy. It effectively overruled its two previous rulings on this precise issue. App. A63-74.

By a 4-2 vote, the Wisconsin Supreme Court affirmed. The court noted that *Arizona v. Washington* mandates that the trial court's holding "'is entitled to special respect,'" App. A13, ¶41 n.22 (quoting 434 U.S. at 510), but elaborated

that, "[b]ecause of the constitutional implications of double jeopardy, an appellate court must satisfy itself that a [trial] court exercised 'sound discretion' in declaring a mistrial." App. A13, ¶42. The court then set forth a litany of requirements it had adopted in an earlier decision that a trial court must meet to exercise "sound discretion": it must "'act[] in a rational and reasonable manner'"; "'act[] in a deliberate manner taking sufficient time in responding to a prosecutor's request for a mistrial'"; "giv[e] both parties a full opportunity to explain their positions and consider[] alternatives such as a curative instruction or sanctioning counsel"; "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity"; and not "'base[] its conclusion on an error of law.'" App. A13-14, ¶43 (quoting *State v. Seefeldt*, 2003 WI 47, ¶¶36-37, 261 Wis. 2d 383, 661 N.W.2d 822, ¶¶36-37).

The Wisconsin Supreme Court then turned to the facts of this case. After finding that defense counsel had not engaged in bad faith, the court ruled "that the [trial] court did not exercise sound discretion in declaring a mistrial when it failed to give adequate consideration to the State's ability to refer to the defendant's silence and to the effectiveness of a curative jury instruction." App. A23, ¶71. According to the Wisconsin Supreme Court, the trial "court overstated the difficulty the prosecuting attorney would have in both commenting on the weakness of the opening statement and avoiding error by referring to the defendant's failure to testify." App. A23, ¶73. The court found that the prosecutor could have "referr[ed] to defense counsel's opening statement as unsubstantiated" in closing argument, and the judge could have provided "a curative jury instruction that opening and closing statements are arguments, not evidence." App. A26-27, ¶¶77-79. This, held the court, "would have cured any possible prejudice resulting from defense counsel's opening statement." App. A27, ¶79.

Justices Wilcox and Prosser each filed a dissenting opinion that the other joined. Justice Wilcox's dissent pointed to the "deferential standard of review set forth in *Washington*" and stated that, "[d]espite the fact that the [trial] court *could have* issued a curative instruction informing the jury that statements of counsel are not evidence, I would not second-guess the decision of the [trial] court to not do so." App. A28, 30, ¶¶83, 86. He noted that, "[h]ere, defense counsel did not simply allude to the testimony of a minor witness who never testified; he presented the entire defense theory of the case to the jury without actually presenting any evidence." App. A30, ¶86. Justice Wilcox also expressed the "concern that the majority opinion opens the door to gamesmanship by unscrupulous and savvy defendants." App. A32, ¶92.

Justice Prosser's dissent added the concern that "the more effective the prosecutor's commentary" in closing argument regarding defense counsel's opening statement, "the more likely Moeck would have had a claim for ineffective assistance of counsel if he were convicted." App. A62, ¶174. All told, in light of all the nuances of the case, "the majority's conclusory determination that the [trial] court erred as a matter of law in its exercise of discretion is a virtual repudiation of the sound policies outlined in *Arizona v. Washington*." App. A62, ¶176.

On June 10, 2005, this Court, per Justice Stevens, issued an order granting the State's stay application "pending the timely filing and disposition of a petition for a writ of certiorari."

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARIZONA V. WASHINGTON.*

The Double Jeopardy Clause allows a trial judge to declare a mistrial over defense objection if the judge finds there is a "manifest necessity" for it or "'the ends of public justice would otherwise be defeated'" if the trial were to continue. *Illinois v. Somerville,* 410 U.S. 458, 461 (1973), (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). *See United States v. Dinitz,* 424 U.S. 600, 606-07 (1976). In *Arizona v. Washington, supra,* this Court addressed how appellate courts, considering double jeopardy claims, should review mistrials caused by an improper opening statement by defense counsel. It is impossible to square the Wisconsin Supreme Court's holding in this case with the rules announced in *Arizona v. Washington.*

1. The Court in *Arizona v. Washington* recognized that "[a]n improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted." 434 U.S. at 512 (footnote omitted). The Court further recognized that curative instructions "will not necessarily remove the risk of bias that may be created by improper argument." *Id.* at 513. For that reason, "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." *Id.*

A problem remained, however: "The interest in orderly, impartial procedure would be impaired if [the trial judge]

were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred." *Id.* at 513. The need to enable a trial judge "to protect the integrity of the trial" militated against "a stringent standard of appellate review in this area." *Id.* at 513 (internal quotation marks and citation omitted). For this reason, held the Court, "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference." *Id.* at 514. Indeed, such a decision is entitled to "special respect" on appeal, *id.* at 510, the same level of deference afforded a trial court's decision to order a mistrial in the face of a deadlocked jury. *Id.*

This Court explained why it is willing to leave such a weighty decision to the sound discretion of the trial judge:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more conversant with the factors relevant to the determination than any reviewing court can possibly be.

Id. at 513-14 (footnote omitted; internal quotation marks and citation omitted).

Accordingly, it does not matter that, in a given case where a mistrial was declared, "some trial judges might have

proceeded with the trial after giving the jury appropriate cautionary instructions." *Id.* at 511. Although this means that "[i]n a strict, literal sense" a mistrial was not "necessary," "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's" mistrial ruling. *Id.*

Applying these principles to the facts before it, the Court held that the trial judge exercised "sound discretion." The judge declared a mistrial because defense counsel's opening statement improperly commented on the fact that, during the defendant's first trial, the prosecution failed to turn over exculpatory evidence. *Id.* at 499-501, 516. This Court observed that "the trial judge was in the best position to assess" the impact on the jury of the improper opening statement, and that the judge gave both parties the opportunity to discuss whether a mistrial was appropriate. *Id.* at 515-16. Although defense counsel argued that "cautionary instructions" would have cured any problem, *id.* at 515 n.34, the Court ruled that the trial judge's decision should be respected. *Id.* at 516.[2]

2. By stark contrast, the Wisconsin Supreme Court launched into *de novo* review of the trial court's painstaking decision to declare a mistrial.

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[2] Although *Arizona v. Washington* came to this Court on review of a grant of federal habeas corpus relief, the Court did not base its decision on that fact. To the contrary, after stating that "compelling institutional considerations militat[e] in favor of appellate deference," the Court inserted a footnote stating that "[t]hese considerations must be at least as weighty where a federal court, in considering a state prisoner's collateral challenge to his conviction on the ground that it violated the Double Jeopardy Clause, reviews the determination of a state trial judge as to juror bias." *Id.* at 513-14 & n.33.

> We must determine whether "the [trial] court erred [in the third trial] when it determined that the State met its burden of showing the requisite manifest necessity to support the mistrial order that terminated" the defendant's third trial.

App. A9, ¶32 (quoting *State v. Seefeldt,* 261 Wis. 2d 383, ¶13, 661 N.W.2d 822, ¶13).

Rather than reviewing the record with the understanding that the trial judge "is far more conversant with the factors relevant to the determination than any reviewing court can possibly be," *Washington*, 434 U.S. at 514 (internal quotation marks and citation omitted), the Wisconsin Supreme Court emphasized the high burden that is on the State to justify a mistrial. *See, e.g.,* App. A12, ¶40; App. A27, ¶80. The court rejected the trial judge's ruling based on its own, independent assessment that defense counsel's error could have been cured through the State's closing argument and a curative instruction.

It may be that the Wisconsin Supreme Court was correct in its assessment of how the jury would have responded to the closing arguments and instructions. But the very nature of deferential review is that an appellate court may not replace a trial judge's judgment with its own merely because the appellate court would have reached a different result. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."). *Also see Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) (the "clearly erroneous" standard does not permit a reviewing court to reverse a trier of fact's finding, "simply because it is convinced that it would have

decided the case differently"). The trial judge in this case "has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors." *Washington*, 434 U.S. at 513-14. The Wisconsin Supreme Court manifestly failed to grant the trial judge the deference he is owed under *Arizona v. Washington*.

Indeed, the need for a mistrial in this case was far greater than in *Arizona v. Washington*. Whereas in *Washington*, defense counsel merely made one improper point (regarding the prosecutor's failure to turn over evidence in the prior trial), here, the entire crux of the opening statement was devoted to telling a story that, in the end, was not supported by any evidence presented at trial. It is one thing to instruct a jury to disregard one discrete assertion made by defense counsel, an assertion unrelated to whether, in fact, the defendant committed the crime. It is a far more problematic thing to instruct a jury to disregard the defendant's entire version of events as conveyed by his counsel. And, as even the Wisconsin Supreme Court recognized, Moeck's Fifth Amendment privilege against self-incrimination complicated efforts to cure the problem. App. A24, ¶74; A26, ¶77 n.47.

All told, the trial judge's decision to grant a mistrial was manifestly reasonable and was entitled to deference. The Wisconsin Supreme Court's decision, in the words of a distinguished jurist remarking on a similarly wrongheaded opinion, leaves *Arizona v. Washington* "in a badly damaged state." *Gilliam v. Foster*, 75 F.3d 881, 905 (4th Cir.) (Wilkinson, J., dissenting), *cert. denied*, 517 U.S. 1220 (1996).

II. FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS ARE DIVIDED OVER WHAT, IF ANY, DEFERENCE IS OWED TO A TRIAL COURT'S DETERMINATION THAT CONDUCT BY THE DEFENSE CREATED A MANIFEST NECESSITY FOR DECLARATION OF A MISTRIAL.

There is strong disagreement among federal and state courts as to how much deference is owed to a trial judge's determination that a mistrial caused by defense trial error is manifestly necessary. Some courts review the question of "manifest necessity" *de novo*. Others treat the issue of "manifest necessity" as a mixed law and fact question with the legal component subject to *de novo* review. Still others give great deference to the trial court's determination as, we submit, this Court in *Arizona v. Washington* intended. There is a sharp split among the federal circuits and an equally sharp split among the state high courts.

Federal Decisions

Six circuits of the federal courts of appeal have issued decisions that gave little or no deference to the trial court's mistrial declaration. *See United States v. Rivera,* 384 F.3d 49, 55 (3d Cir. 2004) ("manifest necessity" is a mixed law-fact question subject to "plenary" review); *United States v. Toribio-Lugo,* 376 F.3d 33, 39 (1st Cir. 2004) (there is no "manifest necessity" when trial court fails to adequately explore alternatives to mistrial); *Brady v. Samaha,* 667 F.2d 224, 229 n.6 (1st Cir. 1981) (review of exercise of discretion and the existence *"vel non"* of "manifest necessity" are questions of law or, at least, mixed law-fact questions); *Gilliam v. Foster,* 75 F.3d at 894-95; *United States v. Sloan,* 36 F.3d 386, 394-95 (4th Cir. 1994); *Johnson v. Karnes,* 198

F.3d 589, 593-96 (6th Cir. 1999); *United States v. Sammaripa,* 55 F.3d 433, 434-35 (9th Cir. 1995); *United States v. Chica,* 14 F.3d 1527, 1531 (11th Cir. 1994) (The Supreme Court "has . . . instructed us to require a high degree of necessity before we conclude" a mistrial over defense objection was appropriate; "we review the entire record in the case without limiting [ourselves]" to the trial court's findings to determine whether mistrial was manifestly necessary [internal quotation marks and citation omitted].).[3]

By contrast, four other circuits of the federal courts of appeal have given a high degree of deference to a trial court's mistrial declaration. *See United States v. Melius,* 123 F.3d 1134, 1138 (8th Cir. 1997) (because the extent of juror bias is difficult to measure, the trial court's evaluation that jurors may have been biased by defense misconduct is entitled to the highest degree of respect); *United States v. Combs,* 222 F.3d 353, 359-60 (7th Cir. 2000) (upholding mistrial declaration due to defense counsel's conflict of interest because any conviction would be subject to challenge on appeal for that reason); *Testa v. Village of Mundelein, Ill.*, 89 F.3d 443, 445-46 (7th Cir. 1996) ("A trial judge has particularly broad discretion in determining whether an incident, in the context of an entire trial, is so serious to warrant a mistrial."); *United States v. Mastrangelo,* 662 F.2d 946, 952-53 (2d Cir. 1981). *Also see United States v. Berroa,* 374 F.3d 1053, 1056-60 (11th Cir. 2004) (record review shows trial judge properly exercised discretion in declaring a mistrial due to a deadlocked jury even though judge erred in not consulting the parties and did not explore alternatives).

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[3] *See also Ross v. Petro,* No. 5:04CV849, 2005 WL 1126758, *22-*24 (N.D. Ohio May 3, 2005) (federal habeas court would not defer to state appellate court ruling that deferred to trial judge's "manifest necessity" finding because it was contrary to *Arizona v. Washington*).

State Court Decisions

Several state appellate courts have made the same error as the Wisconsin Supreme Court, giving little or no deference to the trial court's mistrial declaration. *See Douglas v. United States,* 488 A.2d 121, 133-34 (D.C. 1985) (appellate court reviews record to see whether events at trial were sufficiently serious and whether there were any measures short of mistrial that would have cured any perceived prejudice); *Jackson v. State,* 855 So. 2d 178, 180 (Fla. Dist. Ct. App. 2003); *Rodriguez v. State,* 719 So. 2d 1215, 1216-17 (Fla. Dist. Ct. App. 1998); *Spaziano v. State,* 429 So. 2d 1344 (Fla. Dist. Ct. App. 1983); *People v. Dahlberg,* 823 N.E.2d 649, 655-57 (Ill. App. Ct. 2005); *People v. Largent,* 786 N.E.2d 1102, 1107 (Ill. App. Ct. 2003) (the prosecutor has the same burden on appeal as he does at trial to prove a "manifest necessity" when a trial judge declares a mistrial *sua sponte* over defense objection); *In re Minnis,* 29 P.3d 462, 464 (Kan. Ct. App. 2001) ("In assessing the judge's exercise of discretion, an appellate court determines whether there was a 'manifest necessity' for a mistrial or whether the ends of public justice would otherwise be defeated."); *State v. Gould,* 743 A.2d 300, 302 (N.H. 1999) ("Although we generally defer to a trial court's discretion in declaring a mistrial, especially where the defendant's conduct triggered [the mistrial] declaration [citation omitted], it is our duty to ensure that the 'scrupulous exercise of judicial discretion led to the decision.'"); *Commonwealth v. Rivera,* 715 A.2d 1136, 1139-40 (Pa. Super. Ct. 1998) (because there were available alternatives to address counsel's improper question, there was no "manifest necessity"; trial judge abused discretion in declaring mistrial); *State v. Sheets,* No. 22926-2-III, 2005 WL 1432503, *3, *5 (Wash. Ct. App. June 21, 2005) (record lacks "extraordinary and striking circumstances" and a curative instruction should have been given).

By contrast, at least four States' highest courts complied with *Arizona v. Washington* and gave a high degree of deference to a trial court's mistrial declaration. *See Tubbs v. State,* 583 S.E.2d 853, 857-58 (Ga. 2003) (appellate court deferred to mistrial declaration caused by improper defense opening statement despite availability of curative instruction because existence of alternatives does not render mistrial declaration an abuse of discretion); *Pleas v. State,* 495 S.E.2d 4 (Ga. 1998); *Grimes v. McAnulty,* 957 S.W.2d 223, 224-25 (Ky. 1997) (there are "compelling institutional considerations" favoring appellate court deference to a trial court's evaluation of potential jury bias as a result of defense error), *cert. denied*, 525 U.S. 824 (1998); *Lovett v. Commonwealth,* 472 N.E.2d 236, 238-39 (Mass. 1984) (upholding mistrial declared after defense counsel told the jury in opening statement why his client elected not to testify); *Bailes v. Jolliffe,* 541 S.E.2d 571, 575-76 (W.Va. 2000).[4]

Courts have also split on the narrower issue whether improper opening statements by defense counsel can create a manifest necessity for a mistrial. Some courts, such as the

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[4] *See also Commonwealth v. Murray,* 496 N.E.2d 179, 180-81 (Mass. App. Ct. 1986); *State v. Levison,* 510 N.W.2d 495 (Neb. Ct. App. 1993) (upholding mistrial declared after defense counsel referred in opening statements to evidence he thought would be admissible only to have trial court rule later it was inadmissible); *State v. Colvin,* No. 04AP-421, 2005 WL 704818, *9-*10 (Ohio Ct. App. March 29, 2005) (upholding declaration of mistrial in response to improper closing argument by defense counsel and expressly refusing to apply the less deferential review employed by the Sixth Circuit in *Johnson v. Karnes,* 198 F.3d 589, choosing to rely instead on the dissenting opinion in *Karnes*); *State v. Bayse,* 859 P.2d 542 (Or. Ct. App. 1993) (mistrial upheld where defense counsel repeatedly undercut pretrial ruling not to refer to evidence of child abuse); *In re S.G., Jr.,* 935 S.W.2d 919 (Texas Ct. App. 1996) (mistrial upheld based on improper questions put by defense counsel to a juvenile witness).

Wisconsin Supreme Court here, have given defense counsel almost limitless leeway so long as there is no bad faith; curative instructions and closing arguments will remedy any problems. *See, e.g., Gilliam, supra,* 75 F.3d 881; *Sloan, supra,* 36 F.3d 386; *see also Jackson, supra,* 855 So. 2d 178. Other courts have deferred to a trial judge's declaration of a mistrial if they agree the opening statements were such that they threatened the impartiality of the jury's verdict; the availability of a curative instruction is not controlling. *See, e.g., Tubbs, supra,* 583 S.E.2d at 857-58; *Grimes, supra,* 957 S.W.2d at 224-25; *Lovett, supra,* 472 N.E.2d at 238-39; *Levison, supra,* 510 N.W.2d at 497-500.

The many state and federal decisions that have strayed from *Arizona v. Washington*, the State believes, share two common flaws: (1) They engage in a two-tiered review of the mistrial declaration; and (2) they review the entire record for reasons to undermine, rather than uphold, the trial court's exercise of discretion.

The Two-Tiered Approach. These courts review the issue of "manifest necessity" *de novo,* or as a mixed law-fact question, then profess to review the mistrial declaration based thereon for abuse of discretion. But, if they independently determine that the judge erred in finding a "manifest necessity," then *a fortiori* they will hold that the trial judge abused his or her discretion in declaring a mistrial. Conversely, if they independently determine that there was a "manifest necessity," then they will hold there was no abuse of discretion. This is, in the end, nothing other than independent review of both the "manifest necessity" finding and the mistrial declaration based thereon.

In *United States v. Sloan,* 36 F.3d 386, for example, the trial judge *sua sponte* declared a mistrial over defense objection where defense counsel presented a "Horatio Alger"

account of defendant's life in opening statements, *id. at* 389, 397-98, and the trial judge relied, in his evidentiary rulings, on defense counsel's repeated assurances throughout trial that his client would testify. *Id.* at 389-92. The Fourth Circuit Court of Appeals concluded, after its "painstaking" review of the record, *id.* at 401, that there was no "manifest necessity" because the trial judge failed to explore alternatives and the defendant has the right to decide at any time that he does not wish to testify. Accordingly, the trial judge did not properly exercise discretion. *Id.* at 399-401.

In *Johnson v. Karnes,* 198 F.3d 589, the state trial judge declared a mistrial when defense counsel erroneously asked a witness about the defendant's acquittal of a robbery charge in a previous trial. On federal habeas review of the state conviction, the Sixth Circuit Court of Appeals held that the trial judge unreasonably applied controlling United States Supreme Court precedent in finding a "manifest necessity" because there were available alternatives; consequently, it held the trial judge failed to exercise sound discretion. *Id.* at 595-96, 597. This result caused the dissenting judge to comment: "[T]he attorney's tactics (intentional or not) were brilliant. Future defense attorneys will no doubt pay close attention." *Id.* at 597 (Boggs, J., dissenting).

Finally, in *Spaziano v. State,* 429 So. 2d 1344, involving an auto theft prosecution, defense counsel told the jury in opening statements that the defendant borrowed the car from an acquaintance. The defense rested without putting on any evidence. The court and the attorneys could not agree on a curative instruction. *Id.* at 1345. The Florida court held that the prosecution failed to meet its heavy burden of proving a "manifest necessity" because the defense is free to make a tactical change as the trial proceeds so long as it is done in good faith. *Id.* at 1346. The court never mentioned the abuse of discretion standard for review. *Also see United States v.*

Rivera, 384 F.3d at 57-58 (because there were available alternatives, there was no "manifest necessity;" therefore, trial judge did not exercise sound discretion in declaring a mistrial).

Plenary Review of the Record. Most of the appellate decisions reversing trial court mistrial declarations are decidedly lengthy. *See, e.g.,* App. A1-62; *Gilliam, supra; Sloan, supra.* They are so because those appellate courts engaged in independent review of the entire trial court record. Plenary record review is permitted by *Arizona v. Washington,* but for far narrower reasons. An appellate court should search the record to determine whether it provides "sufficient justification" for a mistrial ruling where the trial court did not make a specific "manifest necessity" finding. *Washington,* 434 U.S. at 516-17. And an appellate court may engage in plenary record review to determine whether the trial judge's decision was "irrational[] or irresponsibl[e]." *Id.* at 514. That is all.

As a result of these non-deferential approaches, appellate courts across the land find themselves engaging in the very same plenary review for trial court error that was reviewed and condemned by this Court in *Arizona v. Washington.* As did the majority opinion here, this non-deferential approach has spawned vigorous dissents in many courts. These are invariably cases where the majority launched into *de novo* review of the record with an eye toward overturning the mistrial declaration, while the dissenting judges reviewed the record (properly) for reasons to uphold the trial court's discretionary decision.[5]

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[5] *See* App. A28-33, ¶¶82-93 (Wilcox, J., dissenting), App. A33-62, ¶¶94-178 (Prosser, J., dissenting); *Gilliam,* 75 F.3d at 908-12 (Wilkinson, J., dissenting), 913-15 (Niemeyer, J., dissenting), 915-16, 922-26 (Luttig, J., dissenting); *Sloan,* 36 F.3d at 402-06 (Niemeyer, J., dissenting) (the

(footnote continued)

Whether the Double Jeopardy Clause bars or permits retrial, then, depends on one's jurisdiction. This Court should grant certiorari and make clear that it meant what it said in *Arizona v. Washington*, namely, that appellate courts must apply a highly deferential standard of review when determining whether a trial court acted reasonably in declaring a mistrial over defense objection where the problem was occasioned by defense misconduct. The issue for the appellate courts is not whether the mistrial declaration was complete or even correct; it is only whether the mistrial declaration was reasonable.

III. THIS CASE INVOLVES A RECURRING ISSUE OF NATIONAL IMPORTANCE.

Trial errors committed by the defense are particularly problematic because an acquittal caused by such errors cannot be remedied. The State, of course, has no right to challenge an acquittal on appeal even where "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), *cited in Arizona v. Washington*, 434 U.S. at 503. It can scarcely be denied that the government's—and the public's—interest in avoiding unfairly-obtained acquittals is great.

Nor can it be denied that the government and the public have a significant interest in preventing defendants from walking free because of mistrials declared based on their own counsels' errors. The Double Jeopardy Clause, how-

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applicable standard for review is whether the trial court's decision was "irrational or an abuse of discretion"); *Karnes*, 198 F.3d at 597-99 (Boggs, J., dissenting); *Douglas*, 488 A.2d at 146-50 (Belson, J., dissenting); *State v. Sheets*, 2005 WL 1432503, at *5-*6 (Brown, J., dissenting).

ever, invariably calls for that result whenever an appellate court concludes the trial judge erroneously declared a mistrial over the defendant's objection, even when the error was caused by the defense.

It is precisely to guide trial judges as they steer between the Scylla of unfairly-obtained acquittals and the Charybdis of overturned mistrials that this Court commands appellate courts not to disturb mistrial declarations based on defense error unless they are "irrational[] or irresponsibl[e]." *Arizona v. Washington*, 434 U.S. at 514. The Wisconsin Supreme Court's decision, and similar decisions by federal and state courts around the country, undermine the solution crafted in *Arizona v. Washington* and place prosecutors and trial judges in an untenable position. The practical problems created by non-deferential review are myriad.

Mistrials will not be declared even when they ought to be.

Criminal trials must be fair but, as with any other human endeavor, they are not perfect. Defense errors, such as the improper opening statement under review here, are common. Trial judges need sufficient room to act to protect the rights of both the State and the defense to a fair trial by an impartial jury. Overly restrictive appellate review will pressure trial judges not to declare mistrials even when necessary to protect against the risk of irreparable jury taint.

As noted, the Double Jeopardy Clause bars retrial of a defendant after an erroneous declaration of a mistrial over his objection. It matters not that the defendant's subsequent trial was fair and error-free. Consequently, if trial judges know that a "close call" will be second-guessed by an appellate court, they will shy away from declaring mistrials even in an egregious situation such as that presented here. As

Professor LaFave has observed, "lurking in the background is the recognition that an appellate court ruling holding that the trial judge improperly . . . order[ed] a mistrial operates to deprive the state of any full opportunity to establish the guilt of a person who well may be guilty." 5 Wayne R. LaFave et al., *Criminal Procedure,* § 25.2(c), at 654 (2d ed. 1999).[6]

Trial judges will not be the only ones to become gun shy. Decisions such as that by the Wisconsin Supreme Court will make prosecutors understandably reluctant to seek mistrials based on defense counsel errors—however strongly they believe a mistrial is warranted. As this Court recognized in *Washington*, however, sometimes "the overriding interest in the evenhanded administration of justice" justifies a mistrial. 434 U.S. at 511.

Defense counsel will have an incentive to make "errors" that favor their clients.

In *Washington*, this Court found that mistrials are necessary to prevent "unscrupulous defense counsel" from obtaining "unfair advantage." 434 U.S. at 513. Because defense error may lead to an unjust acquittal from which the State has no right to appeal, the defendant has every incentive to build in error that favors him. The refusal of appellate courts to defer to mistrial declarations will only encourage defense mischief.

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[6] "The dearth of reported cases on the specific issue of mistrials caused by defense attorney misconduct suggests that most trial courts are reluctant to declare mistrials over defense objections and consequently opt to resolve such problems through the use of their contempt power, allowing the state to suffer the consequences of defense counsel's misconduct. Although this reluctance is understandable, it is hardly fair." *Quinones v. State,* 766 So. 2d 1165, 1171 n.7 (Fla. Dist. Ct. App. 2000).

As it now stands in Wisconsin (and many other States), defense attorneys are free to say whatever they wish in opening statements if they are willing to risk personal sanctions. The prosecutor's only recourse is to draft a tepid curative instruction. Sanctions such as contempt of court or professional discipline do nothing to guarantee the jury's impartiality. In those cases where the stakes are the highest, the temptation for defense counsel to obtain a verdict "based upon an egregiously erroneous foundation" may well overcome whatever deterrence lies in economic or disciplinary sanctions.

In addition, unscrupulous defendants might on their own obtain an unfair advantage even against the advice and strategy of their attorneys. The savvy defendant may, to avoid cross-examination, deceive his own attorney by deciding not to testify after the attorney had just put before the jury the defendant's exculpatory account in the good faith belief that his client would testify. App. A32-33, ¶92 (Wilcox, J., dissenting).

Efforts by trial courts to cure defense counsel errors (rather than declare a mistrial) will often lead to reversals of convictions.

An opening statement by defense counsel that promises evidence not produced, refers to inadmissible evidence, or summarizes a defendant's exculpatory account in a case where the defendant decides not to testify is professional misconduct that can have a powerful impact on the jury leading to an unjust acquittal. *See United States v. Dinitz*, 424 U.S. at 612 (Burger, C.J., concurring). If conviction still results, the likelihood of reversal for a violation of the

defendant's privilege against self-incrimination or ineffective assistance of counsel is great.[7]

As to the former, it is well established that a prosecutor may not comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 614-15 (1965). To be sure, there are circumstances where a defendant "opens the door" to a measured response by the prosecutor to references to silence in the defense case. *See United States v. Robinson*, 485 U.S. 25, 31-34 (1988); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978). As the Wisconsin Supreme Court acknowledged, however, it "is impossible to draw a bright line for all cases between permissible and impermissible comment." App. A24, ¶74 (internal quotation marks and citation omitted).

Whether that "door" is opened, and whether a response is sufficiently "measured," are the sort of nebulous issues that cause reversals on appeal. Indeed, in response to the State's argument in this case that a curative instruction risked reversal on Fifth Amendment grounds, the Wisconsin Supreme Court could only respond: "Perhaps, but a reversal would enable the State to bring yet another prosecution." App. A26, ¶77 n.47. The objectives of the Double Jeopardy Clause are hardly served by assurances that, had the trial

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[7] *See Barrow v. Uchtman*, 398 F.3d 597, 606-08 (7th Cir. 2005); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257-60 (7th Cir. 2003). *Also see United States v. Gomez*, 120 Fed. Appx. 930, 2005 WL 271459 (3d Cir. Feb. 4, 2005) (*sua sponte* mistrial declaration upheld where it was done to protect defendant from the ineffective assistance of counsel and, presumably, to avoid a subsequent appeal and reversal); *United States v. Combs*, 222 F.3d 353, 359-60 (7th Cir. 2000) (mistrial declaration upheld because defense counsel's conflict of interest would have subjected any conviction to reversal on appeal).

judge taken a different route, the defendant may well have had to face another trial anyway.

Even where a defendant's Fifth Amendment rights are not violated by curative instructions and prosecution argument, the potential for reversible error would simply shift from the Fifth Amendment to the Sixth Amendment. *See United States v. Combs*, 222 F.3d at 359-60. As the Wisconsin Court of Appeals acknowledged, "[a]n attorney's failure to produce promised evidence is not lost on a jury. The result can be devastating." App. A71, ¶15. Unwise strategic decisions by defense counsel that lead directly to "devastating" results make for compelling ineffective assistance of counsel challenges. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Barrow v. Uchtman*, 398 F.3d 597, 607 (7th Cir. 2005) (unfulfilled promises by defense counsel in opening statements to present the defendant's testimony are highly suspect under *Strickland v. Washington*).

Making matters worse, "the more effective the prosecutor's commentary" to the jury on the failure of defense counsel to present evidence supporting his opening statement, "the more likely [a defendant] would have . . . a claim for ineffective assistance of counsel." App. A62, ¶174 (Prosser, J., dissenting). This Court's decision in *Arizona v. Washington* has the laudatory effect of eliminating this conundrum. It should be reaffirmed.

CONCLUSION

This Court should grant certiorari and reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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No. 2003AP2-CR
(L.C. No. 97 CF 468)

2005 WI 57

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent-Petitioner,

v.

Richard A. Moeck,

Defendant-Appellant.

FILED

May 6, 2005

Cornelia G. Clark
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE. This is a review of a published decision of the court of appeals[1] reversing a judgment of conviction and an order denying post-conviction relief of the Circuit Court for La Crosse County, Michael Kirchman, Judge. The judgment and order stem from a fourth trial in which Richard Moeck, the defendant, was convicted of two counts of first degree sexual assault, one count of false imprisonment, one count of robbery, and one count of intimidation of a victim. In denying the defendant's motion for post-conviction relief, the circuit court concluded that the defendant's fourth trial following a mistrial in the third trial did not violate double jeopardy protections.

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[1] *State v. Moeck*, 2004 WI App 47, 270 Wis. 2d 729, 677 N.W.2d 648.

¶2 The court of appeals reversed the circuit court's judgment of conviction and order denying post-conviction relief. The court of appeals concluded that there was not a manifest necessity caused by defense counsel's opening statement in the third trial sufficient to warrant a mistrial, and therefore the fourth trial violated the defendant's right to be free from double jeopardy.

¶3 Two issues are presented to this court. First, did the court of appeals err as a matter of law in rejecting the State's argument that the "law of the case" doctrine applied because on two prior occasions the court of appeals rejected the defendant's challenge to the circuit court's order for a mistrial in the third trial? Second, were the Double Jeopardy Clauses of the U.S. and Wisconsin Constitutions violated when the defendant was retried a fourth time following a mistrial in the third trial on the basis of defense counsel's opening statement?

¶4 We hold that the court of appeals did not err as a matter of law in holding that the "law of the case" doctrine did not apply to the defendant's most recent challenge in the court of appeals to the circuit court's order granting a mistrial in the defendant's third trial. We further hold that because the State did not meet its burden of showing a manifest necessity for the termination of the third trial, the circuit court erred in granting the State's motion for a mistrial. Accordingly we agree with the court of appeals that the fourth trial violated the defendant's right to be free from double jeopardy. We therefore affirm the decision of the court of appeals.

I

¶5 In addressing the first issue, the application of the law of the case doctrine, we set forth a brief narration of the procedural posture of the instant case and then examine whether the law of the case doctrine bars the court of appeals

from overturning its two earlier decisions affirming the circuit court's order declaring a mistrial.

A

¶6 The following facts are undisputed. The defendant has been prosecuted four times for allegedly sexually assaulting and robbing the complainant, C.S., on August 2, 1997.

¶7 The defendant's first trial was in January 1998. The defendant testified. The trial ended in a hung jury.

¶8 The defendant's second trial was in March 1998. The defendant testified. The jury convicted the defendant. The conviction was overturned by the court of appeals in October 1999, on the ground that the circuit court committed reversible error in denying the defendant's request for a mistrial after the circuit court, during voir dire, inadvertently mentioned the defendant's repeat offender status three times. The court of appeals held that the curative jury instruction was not sufficient to correct the error.

¶9 The defendant's third trial was in March 2000. The defendant did not testify. The circuit court granted the State's motion for mistrial at the close of all the evidence. The defendant objected to the motion for mistrial. The events surrounding the mistrial are the subject of this review.

¶10 The defendant's fourth trial was in November 2000 before a different circuit court judge than the defendant's three prior trials.

¶11 The defendant moved to dismiss the fourth trial on double jeopardy grounds, arguing that there was no manifest necessity for ordering the mistrial at the third trial. The circuit court denied the motion; the court of appeals granted the defendant's leave to appeal the nonfinal order and

affirmed the circuit court's order denying the defendant's motion to dismiss the fourth prosecution.

¶12 The defendant did not testify at the fourth trial. The jury convicted the defendant on all counts.

¶13 After the jury returned verdicts in the fourth trial finding him guilty, the defendant filed a petition for a writ of habeas corpus in the court of appeals challenging the effectiveness of counsel on the pretrial interlocutory appeal. The court of appeals concluded that, even assuming deficient performance, the defendant failed to prove prejudice because "no amount of advocacy would have convinced this court [of appeals] that the trial court unreasonably exercised its discretion [in granting a mistrial]."

¶14 The defendant then filed a postconviction motion in circuit court, again challenging the fourth trial on double jeopardy grounds. The circuit court once again rejected the defendant's double jeopardy challenge.

¶15 On the defendant's appeal of the conviction and order, raising his double jeopardy challenge for the third time, the court of appeals agreed with the defendant's double jeopardy argument, reversing the judgment of conviction and the order denying the defendant's motion for post-conviction relief. We granted the State's petition for review.

¶16 This review is a review of the court of appeals decision reversing a judgment of conviction and order entered in the defendant's fourth trial.[2] With respect to the law of the case doctrine, we are reviewing the court of appeals' decision in the instant case to disregard its two prior rulings upholding the validity of the circuit court's declaring

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[2] *Moeck*, 270 Wis. 2d 729, ¶8.

a mistrial in the third trial. As we have explained, the court of appeals had twice ruled in the State's favor on the validity of the circuit court's declaring a mistrial. On the defendant's third challenge to the mistrial on appeal from the judgment of conviction, the court of appeals ruled against the State.

B

¶17 We now determine whether the law of the case doctrine bars the court of appeals from overturning its earlier decisions affirming the circuit court's order declaring a mistrial.

¶18 The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal."[3]

¶19 The State argues that because the court of appeals twice ruled that the circuit court's discretionary grant of a mistrial in the third trial was not violative of due process, the court of appeals violated the law of the case doctrine in the present case. There is no question that the court of appeals "reversed itself" in the instant case when it ruled that the circuit court erred in granting a mistrial in the third trial.

¶20 In response to the defendant's first double jeopardy challenge, the court of appeals declared in September 2000 that there was manifest necessity for the mistrial in the third trial and therefore there was no double jeopardy violation.

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[3] *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989).

¶21 In response to the defendant's second double jeopardy challenge, the court of appeals held in June 2002 that no double jeopardy violation resulted from the mistrial.

¶22 In response to the defendant's third double jeopardy challenge, the court of appeals reversed course, holding for the defendant that the fourth trial was a violation of the prohibition against double jeopardy.

¶23 According to the State, when the issue of the validity of the mistrial arose a third time in the court of appeals, the court of appeals should have adhered to its two prior rulings that the circuit court did not err in granting the mistrial. The State argues that the defendant's double jeopardy challenge should have failed once again.

¶24 The issue of whether the two prior decisions of the court of appeals establish the law of the case raises a question of law that this court determines independently of the court of appeals, benefiting from the analysis of the court of appeals.[4]

¶25 The State recognizes, and we agree, that the law of the case doctrine is not an absolute rule that must be inexorably followed in every case.[5] Courts have the power "to disregard the rule of 'law of the case' in the interests of

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[4] *State v. Wurtz*, 141 Wis. 2d 795, 799, 416 N.W.2d 623 (Ct. App. 1987).

[5] "[T]he law of the case doctrine is not a rule to which this court is bound by any legislative enactment, nor it is a rule to be inexorably followed in every case." *Univest*, 148 Wis. 2d at 38-39.

justice" and to reconsider prior rulings in a case.[6] We have recognized that "'cogent, substantial, and proper reasons exist'" under which a court may disregard the doctrine and reconsider prior rulings in a case.[7]

¶26 The court of appeals' third review in the instant case of the defendant's double jeopardy challenge to the circuit court's declaration of the mistrial was apparently based on the same standard of review as were its first two reviews.[8] It had determined twice before that the circuit court had not erroneously exercised its discretion in granting the mistrial. The difference warranting the court of appeals' reversing itself is that in the instant case the court of appeals

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[6] *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986) (quoting *McGovern v. Eckhart*, 200 Wis. 64, 75, 227 N.W. 300 (1929)). The United States Supreme Court has stated similar reasons. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

[7] *Univest*, 148 Wis. 2d at 39 (quoting *Brady*, 130 Wis. 2d at 447 (citing *McGovern*, 200 Wis. at 78)).

[8] The parties debate whether *State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822, changed the deferential erroneous exercise of discretion standard for review the court had previously adopted in double jeopardy cases. The defendant argues that *Seefeldt*, issued after the two court of appeals decisions affirming the circuit court's denial of the defendant's double jeopardy challenge, changed the standard for review. The State counters that *Seefeldt* was not a change in the law and therefore should not be the basis for departure from the law of the case doctrine. We need not address this issue because the departure from the law of the case doctrine is justified on other grounds.

examined all the facts, not just an incomplete version of the facts as it had before.

¶27 The court of appeals had based its prior decision that the circuit court properly exercised its discretion only on the circuit court's written order. In the instant case the court of appeals properly considered and based its decision on the transcript of the circuit court's oral decision. The court of appeals candidly acknowledged in the instant case that its prior summary order rejecting the defendant's double jeopardy challenges erroneously failed to take into account the circuit court's oral decision to grant a mistrial. Instead, the prior order relied on only the circuit court's later written decision.

¶28 The oral decision, in contrast to the written decision, demonstrated that in declaring a mistrial the circuit court erred as a matter of law in failing to exercise its discretion and by abdicating its responsibility to the State.[9]

¶29 At the State's request we examined the circuit court's oral and written decisions and conclude, as did the court of appeals, that they are different. Thus, the facts upon which the court of appeals relied changed between its first two rulings on double jeopardy and its decision in the instant case.

¶30 The court of appeals' failure to examine fully the circumstances surrounding the circuit court's grant of the mistrial in the third trial provides a cogent, substantial, and proper reason for the court of appeals' disregarding the law of the case doctrine in the instant case. The court of appeals' admitted lapses in considering the defendant's double jeopardy challenge should not eviscerate the defendant's constitu-

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[9] *Moeck*, 270 Wis. 2d 729, ¶21.

tional protections. Although the court of appeals used the abdication issue, which was highlighted by the transcript of the oral proceedings, as grounds for disregarding the law of the case doctrine, we conclude, as will be discussed below, that the circuit court's failure to consider fully the prosecutor's ability to countermand defense counsel's opening statement, as well as the court's ability to give a curative jury instruction, are cogent, substantial, and proper reasons for revisiting the double jeopardy challenge.

¶31 We therefore conclude that the court of appeals properly disregarded the law of the case doctrine in the instant case. The prudential law of the case doctrine is not a bar in the instant case to the court of appeals' reexamination of the defendant's double jeopardy challenge.

II

¶32 We turn now to the second issue presented, double jeopardy. We must determine whether "the circuit court erred [in the third trial] when it determined that the State met its burden of showing the requisite manifest necessity to support the mistrial order that terminated" the defendant's third trial.[10] We examine in turn: (A) the constitutional protection against double jeopardy and the manifest necessity standard used to determine whether a mistrial should be ordered; (B) the level of deference to be applied to a circuit court's mistrial order; (C) the circumstances leading up to the granting of the mistrial; and (D) our application of the constitutional principles and standard of review to the circumstances of the case.

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[10] *Seefeldt*, 261 Wis. 2d 383, ¶13.

A

¶33 The Fifth Amendment of the U.S. Constitution[11] and Article I, § 8 of the Wisconsin Constitution[12] provide that a defendant may not be put in jeopardy twice for the same offense.[13] We recently explored the constitutional doctrine of double jeopardy in *State v. Seefeldt*, 2003 WI 47, ¶¶15-19, 261 Wis. 2d 383, 661 N.W.2d 822. That decision guides this case.

¶34 "Jeopardy" means exposure to the risk of determination of guilt. It attaches when the selection of the jury has been completed and the jury is sworn. The parties here do not dispute that jeopardy attached in all four trials. The constitutional protection against double jeopardy "embraces the defendant's valued right to have his trial completed by a particular tribunal."[14] The protection against double jeopardy thus limits the State's ability to request that a trial be terminated and then restarted with a different jury.

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[11] The Fifth Amendment to the U.S. Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[12] Article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment . . . ." This court has been guided by U.S. Supreme Court double jeopardy jurisprudence in construing Wisconsin's double jeopardy prohibition. *Seefeldt*, 261 Wis. 2d 383, ¶15 n.4 (citing *State v. Barthels*, 174 Wis. 2d 173, 181, 495 N.W.2d 341 (1993)).

[13] *Seefeldt*, 261 Wis. 2d 383, ¶15.

[14] *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (internal quotation and citation omitted).

¶35 Underlying the protection against cumulative trials are the principles of fairness and finality. "The underlying idea, one that is deeply ingrained . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[15] Courts have recognized that the double jeopardy protection may be subverted if a circuit court terminates a trial prior to verdict, thereby taking from an accused the opportunity to gain an acquittal when the prosecution has been less persuasive than anticipated.[16]

¶36 An accused's right to have a trial concluded by a particular tribunal can be, under certain circumstances, subordinated to the public interest in affording the State one full and fair opportunity to present its evidence to an impartial jury.[17]

¶37 A mistrial is warranted if the mistrial is "manifestly necessary." The State bears the burden to demonstrate that a "'manifest necessity' [exists] for any mistrial ordered over the objection of the defendant."[18] A "manifest necessity" war-

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[15] *Green v. United States*, 355 U.S. 184, 187-88 (1957). *See also State v. Barthels*, 174 Wis. 2d 173, 181-82, 459 N.W.2d 341 (1993) (quoting *Green*); *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992).

[16] *Green*, 355 U.S. at 188.

[17] *Washington*, 434 U.S. at 505.

[18] *Seefeldt*, 261 Wis. 2d 383, ¶19.

ranting a mistrial is a high degree of necessity.[19] The determination whether a manifest necessity exists is a fact-intensive question. If the State does not meet this burden, the State is not permitted to commence another trial against the accused.

¶38 The circuit court granted the State's motion for a mistrial in the third trial after the jury had been sworn, and the defendant objected to the State's motion. Accordingly, the circuit court's granting the mistrial implicated the double jeopardy clause. The State was thus required to demonstrate that there was a manifest necessity to terminate the third trial.

¶39 The defendant asserts that his constitutional right against double jeopardy was violated by his fourth trial because no manifest necessity existed for a mistrial after the close of evidence during the third trial.

B

¶40 Before reviewing the record to determine whether the State has met its burden, we address the level of defer-

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[19] *Id.* (citing *Washington*, 434 U.S. at 505; *Barthels*, 174 Wis. 2d at 183). This court has also cited approvingly Justice Story's articulation of the manifest necessity test: "Courts of justice [may] discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Barthels*, 174 Wis. 2d at 183 (citing *State v. Copening*, 100 Wis. 2d 700, 709, 303 N.W.2d 821 (1981) (quoting *United States v. Perez*, 22 U.S. (9 Wheaton) 579, 580 (1824))).

ence this court must accord a circuit court's discretionary order declaring a mistrial.

¶41 The level of deference we accord a circuit court's order for a mistrial depends on the particular facts of each case.[20] There is a spectrum of deference to a circuit court's exercise of its discretion in granting a mistrial.[21] In cases like the present one, in which a mistrial was ordered on the basis of defense counsel's opening statement, a circuit court's determination "is entitled to special respect."[22]

¶42 The conclusion that a circuit court's exercise of discretion is entitled to special respect does not end the inquiry. Because of the constitutional implications of double jeopardy, an appellate court must satisfy itself that a circuit court exercised "sound discretion" in declaring a mistrial.[23]

¶43 This court has articulated various considerations that factor into determining whether a court exercised sound discretion. We have described sound discretion as "acting in a rational and responsible manner."[24] Sound discretion further includes "acting in a deliberate manner taking sufficient

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[20] *Seefeldt*, 261 Wis. 2d 383, ¶13 (citing *State v. Barthels*, 174 Wis. 2d 173, 184, 495 N.W.2d 341 (1993)).

[21] *Id.*, ¶25 (citing *Washington*, 434 U.S. at 507-08).

[22] *Id.*, ¶27 (quoting *Washington*, 434 U.S. at 510).

[23] *Washington*, 434 U.S. at 514. "Regardless of the level of deference to be applied, an appellate court must, at a minimum, satisfy itself that the circuit court exercised sound discretion in ordering a mistrial." *Seefeldt*, 261 Wis. 2d 383, ¶13 (citing *Washington*, 434 U.S. at 514 (1978)).

[24] *Seefeldt*, 261 Wis. 2d 383, ¶36.

time in responding to a prosecutor's request for a mistrial."[25] Sound discretion requires giving both parties a full opportunity to explain their positions and considering alternatives such as a curative instruction or sanctioning counsel.[26] Sound discretion also requires that a circuit court ensure that the record reflects that there is an adequate basis for a finding of manifest necessity.[27] Finally, "[s]ound discretion is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion."[28]

¶44 We conclude, as we did in *Seefeldt*, that "regardless of the level of deference to be applied in this case, the circuit court erred in terminating [the defendant's prior trial]."[29]

C

¶45 We now examine the events at the third trial in the circuit court leading to the mistrial.

¶46 The incident that gave rise to the mistrial occurred early in the defendant's third trial. During opening arguments defense counsel discussed at length the defendant's anticipated trial testimony. Defense counsel told the jury that the defendant would testify that the victim was lying, that no assault or robbery occurred, that the victim offered to

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[25] *Id.*

[26] *Id.*

[27] *Id.*, ¶37.

[28] *Id.*, ¶36.

[29] *Id.*, ¶14.

sell drugs to the defendant, that the victim stole money out of the defendant's wallet, and that the victim went to the police with a false accusation of sexual assault and robbery. The defense counsel thus painted the victim as a drug user and dealer, a liar, and a thief. The defense counsel presented the defendant's version of the events of August 2, 1997, as follows:

> On this morning, ladies and gentlemen, what happened, Rich is asleep in his apartment. [C.S.] knocks on the door. Rich says it was 3:09 in the morning because there was a digital clock up on his refrigerator and he wakes up and he happens to notice the time. He recognizes [C.S.] from a meeting that they had a month ago at Kenny's Pub here in La Crosse and at that time they discussed casual marijuana use and Rich said, you know, if you're ever looking to sell some, you know, stop by. [C.S.] comes to Rich's apartment with marijuana looking to sell marijuana that night to Rich. He also asks if he can crash at his place and, in fact, he does spend the evening at Rich's apartment. The reason he stays there is 'cause he says he's tired and he's high at that point. He tells Rich that he had taken a couple hits of LSD just prior to him getting to his apartment.
>
> The next morning they wake up and they discuss this marijuana and Rich says, well, I only want 20 or $30 worth. Rich then goes out into the hallway where the bathrooms are. He doesn't have a bathroom in his apartment. It's out in the hallway. He goes out there. He comes back in, and he notices that the money that was on the counter is now gone. It's missing, and he asks [S.], well, where's the money, and [S.] denies, well, I don't have the money. And he says, where's the money,

> and finally [S.] says, okay, I've got it, and he pulls it out of his sock and gives him his money. At that point Rich is mad and he kicks and pushes him out of the apartment, kicks him out of the building, out the back fire door which is just outside of his apartment door.
>
> At that point [S.] is gone. Rich goes back into his apartment, grabs something to eat, goes back to sleep, and then he's awakened at 11 or a little after 11 o'clock by the police that morning and they execute a search warrant and Rich is arrested.
>
> And that story, ladies and gentlemen, is the only story that's been consistent throughout this case. . . . (R.233:30-31.)

¶47 The prosecuting attorney objected several times during defense counsel's opening statement, but not to this description of the defendant's version of the events of August 2, 1997.

¶48 The victim and police officer testified and were subject to defense counsel's cross-examination. The cross-examination pointed out inconsistencies in the victim's statements and the weaknesses in the police officer's investigation, including failure to collect biological evidence and failure to interview neighbors or bar patrons who might corroborate the victim's story.

¶49 Although the defendant had testified at his first two trials, the defendant did not testify during the third trial.[30] The defendant's decision not to testify was apparently made at the close of the State's evidence. The defendant and his

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[30] The defendant also did not testify at his fourth trial.

counsel apparently were confident that the State had failed to meet its burden of proof. As a result, the defendant did not present any evidence to substantiate defense counsel's opening statement of the defendant's version of the events. The defendant's version was thus presented to the jury through defense counsel's opening statement. The State had no opportunity to cross-examine the defendant.

¶50 During the jury instruction conference, the State requested a curative instruction to address defense counsel's opening statement. The State presented its view as follows:

> Judge, and that's one that in this case [defense counsel] got up in his opening statement and he argued in the opening statement about facts that are in no way in evidence concerning the fact[s in that portion of the opening statement.] . . . I mean, he went through the whole scenario, and we have heard that scenario before when the defendant has testified at the previous trials. Now, however, the defendant has opted not to testify and all of that evidence is in there from the opening statement. There has been no evidence presented at all to corroborate that and now he doesn't put the defendant on to make any effort to corroborate it, so I think that's completely unethical, but aside from that, I think that there has to be an instruction to the jury that they are to disregard that and not consider any of that portion of the opening statement. (R.233:300.)

¶51 Defense counsel explained that he could not know when making his opening statement that the defendant would opt not to testify, especially given that the defendant had testified at two earlier trials conducted by another defense attorney.

¶52 The State, defense counsel, and the circuit court discussed the wording of a curative instruction.

¶53 The prosecuting attorney was concerned what, if any, argument she could make in response to defense counsel's unsubstantiated opening statement. The prosecuting attorney did not want to run the risk of making improper comments on the defendant's failure to testify, an error that might necessitate yet another trial. The prosecuting attorney sought clarification of what she would be allowed to say in closing argument. She explained:

> I would have every intention of not being very kind to [defense counsel] in that closing argument regarding that, and I think I should have the opportunity to, you know, at least make that statement, that a fictional tale was presented and there has been no effort to support that with any evidence. He's basically slinging mud at a victim without any effort to support his statements.

¶54 In response, defense counsel suggested a curative instruction and stated that he doubted the jurors are "gonna hang their hat on something that I said ten hours ago." The circuit court reacted to defense counsel's remarks, saying: "It's not quite that simple . . . . "

¶55 Although defense counsel was willing to waive any objection to the prosecuting attorney's reference to the defendant's failure to testify, the defendant was not.

¶56 The circuit court acknowledged the State's dilemma: The defendant in effect put in his defense without testifying; the State was not able to cross-examine the defendant; and the extent to which the State could comment on the defendant's failure to testify without courting

reversible error was unclear.[31] The circuit court explained the dilemma as follows:

> Yeah, it seems to me the State is in a bind, you know, and might well be entitled to a mistrial. This is the instruction I propose to try to correct that, but the State is gonna be in a bind in argument because they can't directly comment on the defendant not testifying . . . . (R.233:302.)

¶57 After discussion among the prosecuting attorney, defense counsel, the defendant, and the circuit court, the circuit court explained that it was willing to give the jury an instruction that statements of the attorneys are not evidence. The circuit court also mentioned that the State might consider a motion for a mistrial. The circuit court concluded that "the State under the circumstances now would be entitled to a mistrial if they wanted one."

¶58 The circuit court then asked the State whether it wanted to proceed with a curative instruction or to seek a mistrial:

> Do you want to go ahead or not? I mean, I told [the prosecutor], it's on the record, I'm not gonna take it back, I think under—the State under the circumstances now would be entitled to a mistrial if they wanted one. My logic for that is that scenario is in the jury's mind without subject, as we do in trials, to cross-examination. (R.233:306.)

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[31] *See Griffin v. California*, 380 U.S. 609, 614-15 (1965) (the right to remain silent is violated when during a criminal trial the State comments on an accused's silence).

¶59 The prosecutor, an assistant district attorney, conferred with the district attorney regarding whether to ask for a mistrial. The State then requested a mistrial, contending that a curative instruction would not erase the defendant's version of the events from the jurors' minds:

> I think I'm gonna ask for a mistrial, Judge. I'm not gonna be able to erase those facts. I can't argue them on—in my oral argument because I didn't have a chance to cross-examine him about it. It's not even out there before the jury. (R.233:307.)

¶60 The circuit court then asked the State: "Is that your final answer . . . ?" The State responded "Yes." The circuit court declared a mistrial.

D

¶61 We now apply the principles of constitutional protection against double jeopardy and the standard of review to the facts of the case.

¶62 We approach this part of the opinion bearing in mind a concern about "gamesmanship" in opening statements. The trepidation is that a defense counsel or an accused will use an opening statement to furnish a defense unsupported by evidence. A savvy accused would then invoke his or her right not to testify. This tactic would result in the jury having heard the accused's unchallenged theory of the case, denying the State the opportunity to cross-examine the accused. The State does not contend that defense counsel was engaging in gamesmanship or sandbagging or acting in bad faith when defense counsel made opening statements at the defendant's third trial. Therefore, gamesmanship, sandbagging and bad faith by the defendant or defense counsel are not at issue in the instant case.

¶63 We agree with the State that defense counsel "should not allude to any evidence unless there is good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence."[32] The Rules of Professional Conduct for Attorneys also address this issue, providing that a lawyer shall not "in trial, allude to any matter that . . . will not be supported by admissible evidence."[33] We also agree with the State that it is unfair to an opposing party to allow an attorney to present to the jury statements not susceptible to proof but that are intended to influence the jury in reaching a verdict.[34]

¶64 The circuit court and the State take the position that defense counsel's opening statement was improper because the evidence did not support the opening statement.

¶65 The State does not contend that defense counsel's opening statement was in bad faith, that is, the State does not contend that defense counsel had a reasonable basis to believe that his opening statement would not be supported by admissible evidence. The defendant's position in the present case is that defense counsel's opening statement was offered with the reasonable expectation that the defendant would testify and that the opening statement conformed to the defendant's testimony in the prior trials. Defense counsel asserted that he expected the defendant to testify (as the

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[32] American Bar Ass'n, *Standards for Criminal Justice—Prosecution Function and Defense Function*, § 4-7.4, at 218-19 (3d ed. 1993).

[33] SCR 20:3.4(e).

[34] *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

defendant had in prior trials), but he did not know in fact whether the defendant would testify.[35]

¶66 Because this case does not raise the issue of an attorney's making an opening statement in bad faith, we do not address that circumstance.

¶67 The State understandably expresses irritation with defense counsel for not waiting until the outset of the defense case to present his opening statement. This simple measure could have prevented the mistrial. The circuit court expressed similar sentiments. We must recognize, however, that defense counsel had the right to make an opening statement when he did, as long as it was made in good faith, and that nothing would have kept his client from opting not to testify at the last moment.

¶68 We agree with the State that a circuit court may, in an appropriate case, declare a mistrial on the basis of an opening statement that summarizes evidence that is not produced. We disagree with the State, however, that the circuit court exercised sound discretion in granting the mistrial in the defendant's third trial.

¶69 The circuit court did not exercise sound discretion, according to the defendant and the court of appeals, when the circuit court committed an error of law by abdicating its discretion to the State. The defendant argues and the court of appeals held that the State, not the circuit court, decided whether to grant a mistrial.[36] If this view of the record is

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[35] The instant case can be compared with *Arizona v. Washington*, in which the defendant's opening argument referred to inadmissible evidence. *Washington*, 434 U.S. at 499-500.

[36] *Moeck*, 270 Wis. 2d 729, ¶13.

accepted, the circuit court erred by not deciding the question of a mistrial, instead allowing the State to choose between a curative jury instruction and a mistrial.[37]

¶70 We need not determine whether the circuit court abdicated its responsibility to the State or whether the circuit court was merely asking the State and the defense counsel about their respective views of a mistrial.

¶71 We conclude that the circuit court did not exercise sound discretion in declaring a mistrial when it failed to give adequate consideration to the State's ability to refer to the defendant's silence and to the effectiveness of a curative jury instruction. Although the circuit court expressed its belief that the State's response and a curative jury instruction could not rectify any prejudice caused by defense counsel's opening statement, this belief is unfounded.

¶72 We have described sound discretion as "acting in a rational and responsible manner."[38] Sound discretion is not exercised when a circuit court bases its declaration of a mistrial on an error of law. Sound discretion includes considering alternatives such as a curative jury instruction.

¶73 The circuit court erred as a matter of law in its assessment of the State's inability in closing argument to rebut the defense counsel's opening statement. The circuit court overstated the difficulty the prosecuting attorney would have in both commenting on the weakness of the opening statement and avoiding error by referring to the defendant's failure to testify.

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[37] *Id.*, ¶23.

[38] *Seefeldt*, 261 Wis. 2d 383, ¶36.

¶74 The circuit court was correct that a prosecuting attorney ordinarily may not comment on an accused's decision not to testify.[39] There are circumstances, however, when an accused "opens the door" to a measured response by the prosecuting attorney.[40] The defendant opened the door in the instant case. It is impossible to draw "a bright line for all cases between permissible and impermissible comment;"[41] whether a prosecutorial comment crosses over "into the forbidden area of comment on an accused's failure to testify"[42] and "violates constitutional rights must be made case by case."[43] We conclude, however, under the circumstances of the instant case, that the circuit court did not give adequate consideration to the State's response and to a curative instruction.

¶75 The circuit court's error of law is evidenced by *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984), in which the court of appeals addressed a prosecutor's ability to comment on an accused's failure to testify after the accused gave his account of events during opening statements but later refused to testify. In *Johnson*, the defendant gave his own opening statement, but later did not take the stand in his own defense.

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[39] *Griffin v. California*, 380 U.S. 609, 614-15 (1965).

[40] *United States v. Robinson*, 485 U.S. 25, 31-34 (1988); *State v. Keith*, 216 Wis. 2d 61, 80-83, 573 N.W.2d 888 (Ct. App. 1997); *State v. Johnson*, 121 Wis. 2d 237, 247-49, 358 N.W.2d 824 (Ct. App. 1984).

[41] *State v. Edwardsen*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988).

[42] *Id.*

[43] *Id.*

¶76 In closing remarks, the prosecutor in *Johnson* drew the jury's attention to the distinction between argument and evidence.[44] The court of appeals in *Johnson* affirmed the circuit court's allowing the prosecutor's closing arguments.[45]

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[44] In *Johnson* the relevant portion of the prosecutor's closing argument was as follows:

> Let's reflect first upon the opening statement that was given by [the defendant]. First of all just as in my opening statement you understand that [the defendant] was not testifying. [The defendant] was not under oath, [the defendant] was not subjecting himself to cross examination in that opening statement. What he said he was entitled to say just as I was entitled to tell you what I did during my opening statement but it was not evidence, not when I said what I said and when [the defendant] said what he said but remember some of the things he said in that prepared statement he read. He said that the State would not be able to prove what he intended to do on that evening. I submit to you that we have proved beyond any doubt whatsoever what he intended to do that evening and we will review that evidence and see whether you don't agree with me on that.

Johnson, 121 Wis. 2d at 243-44 n.2.

[45] *See also Edwardsen*, 146 Wis. 2d at 214 (when the accused comments on his own silence and gives factual reasons for that silence, the State does not violate the defendant's constitutional right by presenting other explanations to the jury; the State is commenting on unsworn testimony and not on the accused's right to silence).

The court of appeals explained the validity of the prosecutor's statements in *Johnson* as follows:

> The [prosecutor's closing] remarks were aimed at drawing the jury's attention to the distinction between arguments and evidence. This is in precise keeping with the thrust of the standard instruction concerning arguments of counsel. In both opening and closing statements, the prosecutor equated [the defendant's] statement with his own (the prosecutor's) and stressed that neither constituted evidence. Indeed, the prosecutor invited close juror attention to what both he and [the defendant] had to say.[46]

¶77 The circuit court erred as a matter of law in the instant case by concluding that the prosecuting attorney could not effectively countermand defense counsel's opening statement.[47]

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[46] *Johnson*, 121 Wis. 2d at 247-48.

[47] The State argues that the circuit court was reasonable in declaring a mistrial rather than giving a curative instruction in light of the procedural history of the case. The court of appeals had held that a curative instruction was not sufficient in the second trial to correct the error caused by the circuit court's inadvertent reference during voir dire to the defendant's status as a repeat offender. The State argues that with a curative instruction the State risked a reversal for violation of the defendant's Fifth Amendment privilege against self-incrimination. Perhaps, but a reversal would enable the State to bring yet another prosecution. A mistrial here means the State cannot bring another prosecution.

¶78 The jury, after the prosecutor's closing argument and a curative jury instruction, could have been sufficiently admonished in the instant case that any unsubstantiated statements made by defense counsel in opening statements do not constitute evidence. Any prejudice to the State by defense counsel's opening statement would be outweighed by defense counsel's loss of credibility with the jury for his unsubstantiated opening statement.

¶79 We therefore conclude that in the instant case the prosecuting attorney's closing argument referring to defense counsel's opening statement as unsubstantiated, along with a curative jury instruction that opening and closing statements are arguments, not evidence, would have cured any possible prejudice resulting from defense counsel's opening statement. Accordingly, we conclude that it was unreasonable as a matter of law for the circuit court to conclude that there was a manifest necessity requiring a mistrial in the third trial.

* * * *

¶80 For the foregoing reasons, we hold that the court of appeals did not err as a matter of law in holding that the "law of the case" doctrine did not apply to the defendant's third challenge in the court of appeals to the circuit court's granting a mistrial in the third trial. We further hold that because the State did not meet its burden of showing a manifest necessity for the termination of the third trial, the circuit court erred in granting the State's motion for a mistrial. Accordingly, we agree with the court of appeals that the fourth trial violated the defendant's protection against double jeopardy. We therefore affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶81 PATIENCE DRAKE ROGGENSACK, J., did not participate.

¶82 JON P. WILCOX, J. *(dissenting).* I dissent. In the words of the United States Supreme Court:

> Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.

Arizona v. Washington, 434 U.S. 497, 513 (1978). In *Washington*, the trial judge granted a mistrial after the jury was exposed to improper comments during defense counsel's opening statement. *Id.* at 499-501. When reviewing the trial judge's decision to grant a mistrial, the Court concluded: "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. Further, the Court warned of the serious consequences that would follow if "retrial of the defendant were barred whenever an appellate court views the 'necessity' for a mistrial differently from the trial judge[.]" *Id.* at 509-10.

¶83 Following the deferential standard of review set forth in *Washington* and the standard for manifest necessity, I would uphold the circuit court's order granting a mistrial as a proper exercise of discretion. Here, the main thrust of defense counsel's opening statement was that the victim was a liar and that the defendant would inform the jury as to what really happened the night in question. Defense counsel then

went on to explain in great detail the defendant's version of events and relayed the testimony his client had provided in the previous trials. In addition, counsel informed the jury as to the details of the defendant's personal and family life. As the circuit court summarized: "It was a detailed statement of dope and out the door and the money and everything else." No other defense was presented during the opening statement. However, the defendant never testified, and no other witness substantiated the version of events presented during the opening statement. Further, defense counsel later admitted to the court that he was unsure if the defendant would take the stand at the time he made his opening remarks.

¶84 Thus, the defense was able to fully present its theory of the case to the jury without presenting any evidence to support that theory or subjecting the defendant to cross-examination. Regardless of whether defense counsel's opening statement was made in good faith, the fact remains that the defendant was able to present his entire theory of the case without actually introducing any evidence.

¶85 The circuit court considered these facts, the effect the opening statement may have had upon the jury, and the prosecution's ability to make an adequate closing statement in light of the defendant's refusal to testify. The circuit court considered the possibility of issuing a curative instruction and gave both parties an opportunity to present their positions. *See State v. Williams*, 2004 WI App 56, ¶¶29-31 & n.3, 270 Wis. 2d 761, 677 N.W.2d 691. The circuit court was cognizant of the prosecutor's inability to adequately counter the effects of defense counsel's opening statement during his closing, given the nature of the statement and the defendant's invocation of his Fifth Amendment rights. Therefore, the circuit court concluded that a manifest necessity justified a mistrial.

> Defense counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess. The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial.

Washington, 434 U.S. at 514-16.

¶86 Despite the fact that the circuit court *could have* issued a curative instruction informing the jury that statements of counsel are not evidence, I would not second-guess the decision of the circuit court to not do so. Here, defense counsel did not simply allude to the testimony of a minor witness who never testified; he presented the entire defense theory of the case to the jury without actually presenting any evidence. A curative instruction may be appropriate in some cases to remedy the effects of an improper comment during opening statements. In this case, however, there is no possible way a curative instruction would have sufficed to remove the prejudice from the jury, given the nature and extensiveness of defense counsel's reference to the defendant's prior testimony and the prosecutor's inability to comment on the defendant's refusal to testify.

¶87 This case involves an allegation of a sexual assault of one man by another. Defense counsel informed the jury that the defendant was a family man with children and a stable job as a construction worker. He repeatedly referred to the testimony his client had previously provided. He discussed at length the defendant's version of the events the night in question. He discussed in detail how the defendant and victim allegedly met, as well as their subsequent activ-

ities, which included a sale of drugs at the defendant's apartment and a disagreement over money. Defense counsel instructed the jurors: "Remember, Rich says he pushes him out. He kicks him out of the building." Defense counsel repeatedly referred to the defendant's version of events as "the only story that's been consistent throughout this case." The *only* witness that was to substantiate this story was the defendant himself. Yet, the defendant never testified and, consequently, none of these supposed facts were ever presented to the jury.

¶88 While it may be possible to effectively inform a jury to disregard a minor statement or small piece of inappropriately admitted evidence, *State v. Collier*, 220 Wis. 2d 825, 838, 584 N.W.2d 689 (Ct. App. 1998), instructing a jury to ignore the entire opening statement of defense counsel when the defense never puts on a case in chief is like asking a person to not think of the proverbial pink elephant. As the circuit court explained, it was not sufficient to simply provide a curative instruction to the jury in this case because "[t]hey have a reasonable alternative in their minds now before them with no evidence."

¶89 When an appellate court reviews a circuit court decision to grant a mistrial, the circuit court's failure to consider a curative instruction is relevant only if such an instruction was available *and* practical. *See id.* at 837-38. Further, it is not the failure to provide a curative instruction that renders a mistrial an erroneous exercise of discretion; rather, it is the circuit court's failure to give reasoned consideration to the possibility of a curative instruction. *Williams*, 270 Wis. 2d 761, ¶31 n.3.

¶90 If the facts of record reflect the uncertain utility and effectiveness of a curative instruction, this court has all the more reason to defer to the circuit court's ultimate decision on whether to grant a mistrial:

> [The trial judge] is the judge most familiar with the evidence and the background of the case on trial. He [or she] has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he [or she] is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Id., ¶27 (quoting *Washington*, 434 U.S. at 514) (first alteration added).

¶91 Moreover, I disagree with the majority's assertion that "[t]he circuit court erred as a matter of law in the instant case by concluding that the prosecuting attorney could not effectively countermand defense counsel's opening statement." Majority op., ¶77. The majority suggests that the prosecuting attorney had some leeway in commenting on the defendant's refusal to testify in light of defense counsel's opening statement and that the ability of the prosecutor to so comment is not susceptible to bright line rules. Majority op., ¶74. However, I doubt that the State would receive the benefit of such latitude and uncertainty had it in fact chosen that course and the case was before the court on that very issue. *See* majority op., ¶77 n.47 ("The State argues that with a curative instruction the State risked a reversal for violation of the defendant's Fifth Amendment privilege against self-incrimination. Perhaps, but a reversal would enable the State to bring yet another prosecution."). Therefore, I would affirm the circuit court's decision to grant a mistrial in this case.

¶92 Finally, I wish to express my concern that the majority opinion opens the door to gamesmanship by unscrupulous and savvy defendants who, after assuring their counsel that they will testify, invoke their Fifth Amendment rights following counsel's full presentation of their version of

events to the jury. This court should not condone such sandbagging tactics. As the circuit court aptly stated, if defense counsel is unsure that his client is willing to testify at the time of opening statement, then he should wait until the end of the State's case to make his opening statement.

¶93 I am authorized to state that Justice DAVID T. PROSSER joins this opinion.

¶94 DAVID T. PROSSER, J. *(dissenting).* The supreme court is a law-defining, law-developing court. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (citing *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 229-30, 340 N.W.2d 460 (1983)). In this capacity it is expected to address "real and significant" questions of federal and state constitutional law. Wis. Stat. § (Rule) 809.62(1)(a) (2003-04).[1] But the court acts only to resolve actual controversies. It was not designed to announce principles of law beyond the facts of a particular case or to render advisory opinions. *State v. Robertson*, 2003 WI App 84, ¶32, 263 Wis. 2d 349, 661 N.W.2d 105 (citing *State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 535, 251 N.W.2d 773 (1977)); *State v. Witkowski*, 163 Wis. 2d 985, 988, 473 N.W.2d 512 (Ct. App. 1991). Thus, the court's legal pronouncements must be tied to the facts in a case as they are, not as the court might like them to be.

¶95 The present case is extremely troubling because the court appears more interested in announcing principles of constitutional law than in wrestling with inconvenient facts. As a result, the court ends up making unsupported assumptions, misconstruing facts, ignoring ugly realities, denigrat-

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

ing the work of honorable people, and ultimately reaching a flawed conclusion. For all these reasons, I respectfully dissent.

FACTUAL BACKGROUND

¶96 This case involves an alleged series of sexual assaults by Richard A. Moeck, then 49, against C.S., a 23-year-old male, in the early morning hours of August 2, 1997. C.S. claimed that Moeck induced him to come up to Moeck's apartment for a drink and then threatened to kill him with a 12-inch knife if he did not disrobe and submit to multiple degrading assaults. C.S. asserted that he was held hostage for more than four hours and was threatened, slapped, repeatedly assaulted, and robbed.

¶97 Moeck was charged with a number of offenses, including two counts of first-degree sexual assault, one count of false imprisonment, one count of robbery, and one count of intimidation of a witness.

¶98 The case has been tried four times. The first trial in January 1998 ended in a hung jury. The second trial in March 1998 resulted in conviction on five counts. These convictions were subsequently reversed by the court of appeals.

¶99 The third trial in March 2000 is the subject of this review. As the majority correctly states, the circuit court granted the State's motion for mistrial at the close of the evidence. Majority op., ¶9. The fourth trial in November 2000 again resulted in conviction of the defendant on five counts.

¶100 Moeck had a long criminal history dating back to 1960. He had numerous convictions including felonies. Some of his prior offenses had similarity to the alleged offenses against C.S. Thus, when Moeck testified in his own

defense, he was subject to cross-examination and devastating impeachment.

¶101 Moeck testified at the first trial and acknowledged in direct examination that he had been convicted of a crime six times. The prosecutor did not refer to this admission in her cross-examination or her closing argument. This is the trial that ended in a hung jury.

¶102 Moeck also testified at his second trial. Again he acknowledged in direct examination that he had been convicted of six crimes and also admitted that he had been less than truthful to a law enforcement officer during an incident in Green County. At this second trial, the prosecutor emphasized both of Moeck's admissions in cross-examination and in her closing argument. In her closing, she said: "When you talk about a motive to lie, well, the defendant has been convicted of six crimes in the past and he also has admitted that he has given false information to police in the past."

¶103 By the time of the third trial, the State had accumulated more damaging information about Moeck through a presentence investigation (PSI).[2] For example,

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[2] This character evidence would not normally be admissible to prove conduct in conformance therewith. Wis. Stat. § 904.04(2). However, when the defendant chooses to place his character in issue, the defendant "opens the door" to rebuttal evidence about his character. Wis. Stat. § 904.04(1)(a); *State v. Pulizzano*, 155 Wis. 2d 633, 658, 456 N.W.2d 325 (1990); 7 Blinka *Wisconsin Practice: Wisconsin Evidence* § 404.4 at 133 (2d ed. 2001). Defense counsel effectively put Moeck's character in issue during his opening argument by referring to Moeck's children and the length of time Moeck had been married. Professor Blinka uses this

(*footnote continued*)

District Attorney Scott Horne used information from the PSI at the sentencing hearing after the second trial. He told the court that in one incident in Florida, Moeck had "assaulted a victim with a weapon, took his wallet and tied him to a tree." In another incident in Illinois in 1993, Moeck invaded a home "while masked, slapped a woman, ultimately stabbed her in the hand and leg." Moeck had threatened a range of people, from his former wife to police officers and court personnel.

¶104 The case against Moeck was complicated by the fact that C.S. also had criminal convictions (five at the time of the third trial) as well as some inconsistencies in his prior testimony. Thus, the pivotal issue for the jury was the credibility of the victim versus the credibility of the defendant. Moeck's attorney at the third trial, Timothy Gaskell, acknowledged as much when he wrote: "The thrust of the case has always been whether the alleged victim . . . is a credible witness."

¶105 These dynamics were fully understood by the defendant, his attorney, the prosecutor, and the court at the opening of the third trial. Attorney Gaskell, who replaced Attorney Fabio Burgos after Moeck fired him, gave an opening statement in which he presented the defendant's entire account of events, but then offered no evidence to support his story. The defendant did not testify, as he had before, and thereby escaped the cross-examination and impeachment he had faced in the first two trials. Gaskell also stressed in his opening that C.S. had been inconsistent in

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precise example (the defendant's status as a "family man") as a situation in which the prosecution might be allowed to introduce responsive character evidence. *Id.*

his prior testimony but that Moeck's account had not varied when he testified.

¶106 The court granted the State's motion for a mistrial after the defendant failed to produce evidence to corroborate the opening statement and after the State contended that it could not neutralize the prejudice it had suffered by cautionary instructions and closing argument. This discretionary decision by the circuit court was twice affirmed by the court of appeals, before it was reversed.

¶107 The legal issues now before the court cannot be separated from these background facts. The circuit court had a complete grasp of these background facts and was aware from personal observation that the defendant's personality changed dramatically when the jury was not present.[3]

LAW OF THE CASE

¶108 The first issue concerns the law of the case doctrine. The majority explains that the law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." Majority op., ¶18 (quoting *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989)). Nevertheless, the law of the case doctrine is not an absolute rule. Majority op., ¶25. It can be set aside in the interests of justice "whenever cogent,

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[3] For instance, the court removed the defendant from the courtroom because of his shouting and disruption during a sentencing hearing. In *Arizona v. Washington*, 434 U.S. 497, 513-14 (1978), the Court noted that the trial judge "is the judge most familiar with the evidence and the background of the case on trial."

substantial, and proper reasons exist." *McGovern v. Eckhart*, 200 Wis. 64, 75, 78, 227 N.W. 300 (1929).

¶109 The majority opinion conveys the impression that the court of appeals considered this issue only once prior to its decision in the present appeal. Majority op., ¶¶26-28. In reality, though, the court of appeals *twice* affirmed La Crosse County Circuit Judge Dennis Montabon's decision to grant the State a mistrial in Moeck's third trial. The court of appeals initially considered Moeck's argument in September 2000 when, shortly before the fourth trial, the defendant moved to dismiss the case on double jeopardy grounds. When his motion was denied by Judge Montabon, the defendant sought an appeal of the court's nonfinal order. Majority op., ¶11.

¶110 In his petition to the court of appeals, Attorney Gaskell attached several documents. The documents included a 3-page excerpt of his opening statement *and the complete 11-page transcript of the instructions conference.* This short transcript contained the entire discussion of the State's motion for mistrial.

¶111 In this appeal, Assistant Attorney General James M. Freimuth repeatedly referred to the discussion at the instructions conference and cited pages from the defendant's petition and attached documents. Freimuth concluded, on page 18 of his Response to Petition For Leave to Appeal, that "*the excerpt of the record provided by defendant in the present case* fully supports the trial court's exercise of discretion in granting the State's motion for mistrial based on defense misconduct." (Emphasis added.)

¶112 Upon reviewing these papers, a court of appeals panel consisting of Judges Charles Dykman, William Eich, and Patience Roggensack entered a summary order affirming the circuit court. The order read in part:

> [B]ased on our review of the petition *and the attached documents*, we conclude that the State's . . . proposal of granting leave to appeal and summarily affirming would best serve the interest of judicial economy. We further conclude that the trial court's memorandum decision and order identifies and applies the proper legal standards to the relevant facts and reaches the correct conclusion. (Emphasis added; citation omitted.)

The court of appeals then attached the circuit court's written decision to its order.

¶113 The court of appeals reviewed the same issue again in June 2002. After his conviction at the fourth trial, the defendant filed a petition for a writ of habeas corpus in the court of appeals. The petition challenged the effectiveness of Moeck's counsel in the earlier pretrial interlocutory appeal. Majority op., ¶13. Once again, the defendant's papers included the complete transcript of the instructions conference.

¶114 A panel consisting of Judges Dykman, Roggensack, and Paul Lundsten entered an order denying the writ. The order read in part:

> Moeck petitioned for leave to appeal from the trial court's order permitting a retrial and denying his motion to dismiss the charges, claiming double jeopardy. We granted the petition . . . but summarily affirmed the trial court's ruling on double jeopardy.
>
> . . . .
>
> In Moeck's present petition he contends that had appellate counsel adequately argued the issue [on the interlocutory appeal], he would have prevailed . . . . The trial court's decision to allow a

> retrial was discretionary. *This court will summarily affirm an exercise of discretion only if the record is clear that the discretion was properly exercised. See Wisconsin Court of Appeals Internal Operating Procedures, Section VI, Sub. 1.* In short, no amount of advocacy would have convinced this court that the trial court unreasonably exercised its discretion. It was clear that the court did not.[4] (Emphasis added.)

¶115 Moeck then pursued a direct appeal of his conviction and the denial of his post-conviction motion for relief, raising the same double jeopardy issue that the court had decided previously. In this third "appeal," the panel consisted of Judges Dykman, Margaret Vergeront, and Paul Higginbotham. In its opinion reversing Moeck's conviction on double jeopardy grounds, the court stated:

> Prior to his fourth trial, Moeck moved to dismiss the complaint on double jeopardy grounds. The trial court denied the motion in a written opinion. Moeck petitioned this court for leave to appeal. We granted the petition and summarily affirmed, reasoning that the trial court's written opinion "applie[d] the proper legal standard to the relevant facts and reache[d] the correct conclusion." *However, we failed to review the transcript showing the trial court's reasoning when it granted the State's request for a mistrial.*

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[4] Moeck petitioned for review in this court, but his petition was denied on September 26, 2002. This petition also contained the relevant transcript.

State v. Moeck, 2004 WI App 47, ¶6, 270 Wis. 2d 729, 677 N.W.2d 648 (emphasis added). The court of appeals added:

> *When we reviewed Moeck's petition for review, we examined Judge Montabon's written order and not his oral decision on the State's motion for a mistrial.* Though the two are similar in some respects, the oral decision makes clear that the trial court left the mistrial decision up to the State. The trial court would have given a curative instruction had the State requested that instead of a mistrial. And the court reasoned that the defense counsel's failure to produce evidence promised in opening statement necessitated a mistrial. *Had we reviewed the transcript, we would have observed this.*

Id., ¶21 (emphasis added).

¶116 The court's assertion that it did not examine the transcript of the circuit court's oral decision in the first appeal in 2000 is extraordinary. It is an assertion about what Judge Dykman, Judge Eich, and Judge Roggensack considered in reviewing Moeck's interlocutory appeal.

¶117 Although the judge who wrote the decision was admittedly a member of all three panels, he was not empowered to write about what Judge Eich and Judge Roggensack thought and considered four years earlier. The other two members of the third panel were not involved in the earlier cases.

¶118 There is absolutely no evidence that either Judge Eich or Judge Roggensack has ever confirmed the court's statement that they never considered the short transcript that was before them. The court's 2000 order contradicts the court's 2004 statement because it asserts that the court reviewed the defendant's "petition and attached documents."

¶119 Moving to this court, the majority opinion states that the cogent, substantial, and proper reason for disregarding the law of the case doctrine is that "[t]he court of appeals had based its prior decisions that the circuit court properly exercised its discretion only on the circuit court's written order." Majority op., ¶27. The texts of the two court of appeals orders demonstrate that this is not correct. The majority goes on: "The court of appeals candidly acknowledged . . . that its prior summary order rejecting the defendant's double jeopardy challenges erroneously failed to take into account the circuit court's oral decision to grant a mistrial." *Id.* Again the majority is not correct. The court of appeals did not make any such representation about its second order.

¶120 It is astonishing for this court to assert that Judge Roggensack (twice), Judge Eich, and Judge Lundsten never considered a short transcript that was central to the issue in front of them before they made their decisions, particularly when the court of appeals' summary orders state otherwise and the defendant attached the relevant document to his filings on both occasions. Judge Roggensack should have had an interest in the case because she wrote the opinion reversing Moeck's convictions in the second trial for failure to grant *his* request for a mistrial.

¶121 By affirming the court of appeals, this court is ratifying a dangerous new procedure in which one judge's subjective memory of a transaction that occurred four years earlier is permitted to override the plain language of a contemporary court order. For us to conclude that this questionable procedure constitutes a cogent, substantial, and

proper reason for setting aside the law of the case is nothing less than a lethal blow to finality in our courts.[5]

¶122 The court of appeals gave an additional reason for disregarding the law of the case doctrine, namely, that "the oral decision makes clear that the trial court left the mistrial decision up to the State." *Moeck*, 270 Wis. 2d 29, ¶21. "The record shows that the trial court allowed the State to determine whether there was manifest necessity to terminate the third trial. Such discretion resides only with the judiciary." *Id.*, ¶13.

¶123 My reading of the transcript is very different. The third jury trial was conducted on March 15, 2000. Evidence in that trial concluded about 5:30 p.m. Thereafter, the court excused the jury and met in the courtroom with Assistant District Attorney Robyn Matousek, defense attorney Gaskell, and the defendant. In this meeting, the defendant confirmed that he did not wish to testify, and defense counsel requested and was granted an instruction that the defendant had an absolute constitutional right not to testify. This discussion was followed by a short recess.

¶124 When the parties returned, the court furnished copies of proposed instructions. The State requested an additional instruction to deal with defense counsel's opening statement. The prosecutor complained vehemently that defense counsel "went through the whole scenario" [of the defendant's account] in his opening statement, including an assertion that the defendant had testified at the previous trials, then failed to present any evidence to corroborate what he had said. "[S]o I think that's completely unethical," the

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[5] The majority never satisfactorily explains why the second court of appeals order should be disregarded.

prosecutor argued, "but aside from that, I think that there has to be an instruction to the jury that they are to disregard that and not consider any of that portion of the opening statement."

¶125 Attorney Gaskell insisted that opening statements are not evidence, and that he had a right to tell a jury what he believed a defendant would say without losing the constitutional right not to put that defendant on the stand.

¶126 Judge Montabon disagreed. "You can't tell the jury what the evidence is gonna show and then don't show it," he said. Moments later, the court added: "[I]t seems to me the State is in a bind . . . and might well be entitled to a mistrial.[6] This is the instruction I propose to try to correct that, but the State is gonna be in a bind in argument because they can't directly comment on the defendant not testifying." Judge Montabon then suggested the following instruction: "The jury is not to consider any statement of certain facts made in opening statements when such facts were not supported by evidence received during the course of this trial."

¶127 The prosecutor immediately responded: "Can I have about five minutes? I would like to confer with [District Attorney] Horne about whether or not I should be asking for a mistrial in this case." Matousek took the judge's proposed instruction with her.

¶128 When she returned, Matousek explained that she met with C.S. to determine whether he was willing to go

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[6] In *State v. Copening*, 100 Wis. 2d 700, 709, 303 N.W.2d 821 (1981), the court observed: "[I]t is not infrequent that a trial court discerns *sua sponte* the necessity for a mistrial."

through a fourth trial. He was. "I need to make clear, though, before I make [a] decision to request a mistrial . . . exactly how far would the Court be allowing me to go as far as statements in a closing argument commenting on . . . basically a fictional tale presented in the opening statement . . . and no evidence presented and no effort to present evidence to support that?" She emphasized that she had "every intention" of not being very kind to Attorney Gaskell. "I think I should have the opportunity to . . . at least make [the] statement, that a fictional tale was presented . . . . He's basically slinging mud at a victim without any effort to support his statements."

¶129 Gaskell fought back. "Opening statements are not evidence . . . . If we actually in any way, shape, or form believe that the jury is gonna hang their hat on something that I said ten hours ago, I think that's an absurd notion. *They're gonna base it on whether they believe [C.S.] or not.*" (Emphasis added.)

¶130 The court replied: "It's not quite that simple, Mr. Gaskell. They [the jury] have a reasonable alternative in their minds . . . with no evidence whatsoever to support it. Reasonable or not, they have an alternative."

¶131 "I haven't had a chance to do any cross-examination," the prosecutor complained. "I can't include that in . . . any part of my closing argument as I have in the past two trials."

¶132 In further discussion, the court opined that the prosecutor could say there was no proof of what defense counsel had said "as long as you don't say . . . the defendant didn't get up here and tell us that, or words to that effect . . . [I]f you say, the defendant didn't get up here and say this, we will likely be trying it again."

¶133 The court added: "I read about [attorney] misconduct [in] opening statements. It's clear[,] I think[,] that the Court can grant a mistrial."

¶134 Attorney Gaskell then appeared to compromise:

Mr. Gaskell: I think if Ms. Matousek -- if she wants to argue . . . that we didn't present any supporting evidence based on my opening statement, I mean, to move this thing along --

Ms. Matousek: Are you waiving any objection to that?

The Defendant: No.

Mr. Gaskell: As long as --

The Defendant: No. Nope.

Mr. Gaskell: Well, Your Honor, I think you're right, as long as she doesn't say, the defendant didn't get up on the stand and say that -- I mean, I think she can say that I indicated that in opening statement and that I didn't present any testimony to back that up or evidence to back that up.

¶135 At this point, the record shows open conflict between the defense counsel and the defendant. The defense counsel appears to be making a concession that the defendant is unwilling to make.

The Court: [to the prosecutor] Do you want to go ahead or not? . . . [T]he State under the circumstances now would be entitled to a mistrial if they wanted one.

Ms. Matousek: I think I'm gonna ask for a mistrial, Judge. I'm not gonna be able to erase

> those facts. I can't argue them . . . in my oral argument because I didn't have a chance to cross-examine [the defendant] about it. It's not even out there before the jury.
>
> . . . .
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> The Court: Motion for a mistrial is granted.

¶136 The transcript shows that the court several times suggested that the State was entitled to a mistrial if the State wanted one. Against this background, the question was whether the State wanted a mistrial or whether it wanted to proceed. Although the State took the position that it had been prejudiced, it unquestionably retained the option whether to go forward or seek a new trial. As a result, it was meaningless for the court of appeals to conclude that "the trial court left the mistrial decision up to the State." *Moeck*, 270 Wis. 2d 729, ¶21. Surely, this court is not holding that when the State has been prejudiced, the court may declare a mistrial even though the State does not want one.

¶137 The court of appeals also said that "the trial court allowed the State to determine whether there was manifest necessity to terminate the third trial." *Id.*, ¶13. That *would* be meaningful, but that conclusion is not supported by the record. The State gave reasons why it wanted a mistrial and the court granted the mistrial.

¶138 Whether the court made the correct ruling is a different question from whether the court abdicated its discretion to the prosecutor. Two court of appeals decisions concluded that Judge Montabon made the correct decision in granting the State's motion for a mistrial. I see no cogent, substantial, and proper reason *based on facts* why the court of appeals' prior rulings should not be considered the law of the case. The circuit court did not abdicate its discretion; it

recognized that the State had options and permitted the State to select an option.

MANIFEST NECESSITY

¶139 The majority's decision to disregard the law of the case doctrine makes it necessary to address the second issue, whether the fourth trial violated the defendant's right against double jeopardy because no "manifest necessity" for a mistrial existed after the close of evidence in the third trial. The majority concludes that the State did not meet its burden of showing a "manifest necessity" for terminating the third trial, and, thus, the circuit court erred in granting a mistrial. Majority op., ¶80.

¶140 Justice Wilcox has authored a powerful dissent, which I join, but there are additional details about the evidence and the majority's opinion that deserve comment.

¶141 This case involves a vulnerable victim. At the time of the third trial, C.S. had five criminal convictions and a pattern of making misstatements to law enforcement. His checkered history fully justified a challenge to his credibility, but it did not excuse assaults on his person. The prosecutor acknowledged these problems in her opening statement, and explained that C.S. had to relive the incident in several different testimonies.

¶142 The defendant's opening statement was 17 pages in length. As the majority accurately states, the State did not object to the defendant's version of events because it was consistent with Moeck's prior testimony. The State would likely have objected to the substance of the story had it known the defendant would offer no evidence to support his narrative. The State's three objections actually reinforced the defendant's story because each one focused on the argumentative nature of coursel's remarks, not the substance of his allegations. The court responded to the objections with

comments such as "Tell them what your evidence will show" and "You will have ample opportunity to argue."

¶143 The defendant's opening statement told the jury that "the evidence is gonna be significantly different" from the events described in the State's opening, and "here are some of the things that are gonna be significantly different."

¶144 Shortly thereafter, defense counsel stated that "[C.S.] has testified . . . at previous hearings in this matter. *Rich has done the same thing*, and the only person in this case that has been consistent with their story *and with their testimony* is Rich." (Emphasis added.)

¶145 This comment distinguishes the present case from most others in which defense counsel makes an improper opening. The State could not dispute the fact that Moeck had testified twice before. This fact, once revealed, was reinforced by every reference to previous trials. It could not be erased by a cautionary instruction and could not be discussed in the prosecutor's closing argument without reminding the jury that the defendant had not testified at this trial. Thus, when the defense attorney relayed Moeck's version of the encounter with C.S., it had much greater credibility than it would have had in an opening at a first trial.

¶146 Attorney Gaskell also volunteered that Moeck is "a 250-pound construction worker. He's been married twice before. He's got three children and those marriages lasted approximately 17 years."[7] Moments later he skillfully contrasted this uncontested information with the statement that,

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[7] This evidence could easily be seen as character evidence. *See supra* n.2. Because Moeck did not actually testify, the State had no opportunity to rebut this "evidence," further justifying the court's decision to grant a mistrial.

"You're not gonna hear any evidence in regards to any kind of homosexual activity or any homosexual materials that were either found in Rich's apartment or nobody else is gonna come up here and say, 'yeah . . . Rich Moeck's a homosexual.' There's . . . gonna be no evidence in regards to that."

¶147 Attorney Gaskell's prediction proved to be correct. Because he was familiar with the first two trials, Gaskell was able to effectively demolish a straw man (which the jury would have noted), present the defendant's story of the incident, *and* avoid any cross-examination or impeachment of the defendant.

¶148 When Gaskell repeatedly argued that "the only person in this case that has been consistent with their story and with their testimony is Rich," however, he was not being completely candid. One example illustrates the point.

¶149 At the first trial, Moeck contended that he met C.S. at Kenny's Pub, a tavern in La Crosse, that he and C.S. were drinking at the bar, that C.S. asked Moeck if he wanted to go outside in the back of the tavern and smoke a joint. They did, according to the story, and Moeck told C.S. that he might want to buy some pot once in a while. "After we got to talking, I told him where I lived and that's how he knew where I lived." Moeck provided this background as his explanation for how and why C.S. knocked on his apartment door at 3:09 on a Saturday morning.

¶150 On cross-examination, the prosecutor attacked the plausibility of this story and obtained a concession that C.S. did not write down Moeck's address. Moeck also said he lived in one of several apartments above Spanky's Tavern. In closing argument, the prosecutor declared:

> [Y]ou hear from the defendant that he had met [C.S.] about a month before, [had a conversation

with him] in a bar . . . told him that he lived up above Spanky's and a month later after having no other contact with him, [C.S.] comes to the defendant's apartment. *How [C.S.] knew which apartment it was when there are four or five different apartments on that particular floor is beyond me.* Maybe he went knocking at all different ones at 3 in the morning, but *I think it's pretty farfetched to believe that [C.S.] knew exactly which apartment to go to to try to sell this marijuana to the defendant.* [C.S.] didn't even remember exactly what apartment number it was when he testified on the stand. . . . [W]e're to believe that [C.S.] was able to remember, not only that but he was able to remember and locate the defendant after having had two hits of LSD and so he's supposed to be able to find his way to an apartment that he's never been to. (Emphasis added.)

¶151 In the second trial, Moeck headed off part of this attack on his credibility by "remembering" new facts:

Q: And when you described where you lived, how did you put that to him?

A: Well, I told him what door to go in. He knew where Spanky's was, so I told him what door to go in, right next door to Spanky's, and to go up to the first floor *and my apartment was the last one on the left.* (Emphasis added.)

¶152 On cross-examination, he volunteered this information:

Q: Did you see [C.S.] write down the information about where you lived?

A: No, but I told him how to get to my apartment.

¶153 If the defendant had been subject to cross-examination, the implausibility and inconsistency in his testimony would have been exposed. That, of course, never happened. Instead, Attorney Gaskell was able to spend 13 pages of his opening statement on discrepancies and inconsistencies in the victim's testimony and then followed that up with vigorous cross-examination of the victim at trial.

¶154 Attacking the credibility of a victim's testimony is a legitimate trial tactic. Telling the defendant's side of the story in an opening statement, then failing to corroborate a word of that story with testimony is not legitimate, especially when the story escapes all adversary challenge at trial.

¶155 The "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988).

¶156 These principles were foreshadowed in *Arizona v. Washington*, 434 U.S. 497 (1978), a case involving an improper opening statement by defense counsel. *Washington* is discussed extensively by the majority and the dissent of Justice Wilcox. However, the majority opinion downplays the deference the *Washington* Court said ought to be given to a circuit court's exercise of discretion in granting a mistrial in these circumstances. The *Washington* Court said:

> [T]he trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury.
>
> . . . .

We recognize that the extent of the possible bias [affecting the impartiality of the jury] cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the even-handed administration of justice requires that we accord *the highest degree of respect* to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

. . . .

An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. . . . [This] action[], however, will not necessarily remove the risk of bias that may be created by improper argument. . . . [T]he trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. *The adoption of a stringent standard of appellate review in this area . . . would seriously impede the trial judge in the proper performance of his "duty,* in order to protect the integrity of the trial, to take prompt and affirmative

> action to stop . . . professional misconduct" (citing *United States v. Dinitz*, 424 U.S. 600, 612 (1976)).

Washington, 434 U.S. at 510-513 (emphasis added).

¶157 The Court acknowledged that a trial judge was required to exercise sound discretion in declaring a mistrial, *id.* at 514, but Justice Stevens, writing for the Court, indicated that this meant not acting "irrationally or irresponsibly," as opposed to going through a long checklist of inquiries and alternatives as the prerequisite for establishing sound discretion. *Id.* "Neither party has a right to have his case decided by a jury which may be tainted by bias." *Id.* at 516. "The state trial judge's mistrial declaration is not subject to collateral attack . . . simply because he failed to find 'manifest necessity' *in those words or to articulate on the record all the factors* which informed the deliberate exercise of his discretion." *Id.* at 517 (emphasis added).

¶158 The majority appears to interpret *State v. Seefeldt*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822, as creating a checklist for establishing sound discretion and a stringent standard of review. This is unwarranted. *Seefeldt* was decided on less egregious facts than the present case, in circumstances more amenable to corrective action and cautionary instruction. *Seefeldt* was also grounded in *Washington* and *State v. Barthels*, 174 Wis. 2d 173, 184, 495 N.W.2d 341 (1993). It should not be reinterpreted here to establish new requirements that did not exist five years ago.

¶159 In *Washington*, the Court started with the premise that defense counsel's comment in the opening statement was not proper. *Washington*, 434 U.S. at 511. By contrast, the majority in the present case starts with the proposition that the opening statement was proper when delivered. To support this proposition, the majority makes the following statements:

1. "The defendant's decision not to testify was *apparently* made at the close of the State's evidence." Majority op., ¶49 (emphasis added).

2. "The defendant and his counsel *apparently* were confident that the State had failed to meet its burden of proof." *Id.* (emphasis added).

3. "*As a result*, the defendant did not present any evidence to substantiate defense counsel's opening statement of the defendant's version of the events." *Id.* (emphasis added).

4. "Defense counsel explained that he could not know when making his opening statement that the defendant would opt not to testify, especially given that the defendant had testified at two earlier trials conducted by another defense attorney." *Id.*, ¶51.

5. "Defense counsel asserted that he expected the defendant to testify (as the defendant had in prior trials), but he did not know in fact whether the defendant would testify." *Id.*, ¶65.

¶160 The problem with these statements is that the first three are pure speculation and the last two are not substantiated by the record. At no point in the instructions conference did defense counsel make a statement that he expected the defendant to testify. In fact, at no point in his 17-page opening statement did counsel say words such as "Rich Moeck will testify that . . . ," whereas he did make such statements about C.S. and about a La Crosse police officer. The defendant's opening statement is so carefully constructed and so detailed in its recitation of the victim's inconsistencies that it is hard to imagine that defense counsel was oblivious to whether the defendant would testify. When

counsel was accused to his face by the prosecutor of being unethical, he answered with generalities, not specifics.

¶161 If defense counsel actually expected the defendant to testify, he may have been misled by the defendant himself. The defendant spoke up personally when the prosecutor asked if the defense was waiving any objection to a pointed closing argument about the failure of the defense to produce evidence.

Ms. Matousek: Are you waiving any objection to that?

The Defendant: No.

Mr. Gaskell: As long as --

The defendant. No. Nope.

¶162 This blunt exchange is reminiscent of a colloquy that occurred at a sentencing hearing after the second trial when the defendant fired his first attorney:

The Court: You don't wish to have Mr. Burgos represent you?

The Defendant: Nope.

The Court: Do you want another lawyer--

The Defendant: Nope.

The Court: -- to represent you?

The Defendant: Nope.

¶163 Shortly thereafter, the defendant attempted to prevent the district attorney from speaking. "Nope, he can't say nothing. He ain't got nothing to say." Eventually, the court

removed the defendant from the courtroom for vulgarity, shouting, and disruption.[8]

¶164 Thus, there is good reason to dispute the majority's position that the defendant's opening statement was proper when it was delivered.[9] The State persuasively argues that the defendant's opening was "a textbook example of how not to present an opening statement to the jury." It quotes the late Chief Justice Warren Burger that:

> An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the

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[8] At one point, the defendant said: "Yeah, I'm not going to sit here and listen to the State's bullshit so just take me out."

[9] The majority appears to draw a distinction between an opening statement that is proper when delivered and an opening statement that is made in bad faith. In this case, the defendant's opening statement was prejudicial to the State irrespective of whether it was delivered in bad faith. It was not less prejudicial because it was arguably proper when delivered. In light of the defendant's failure to testify, the opening statement inflicted the same irreparable damage on the State's case regardless of when it became clear that the statement was impermissible.

> standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

¶165 There is real danger that the court is rewriting the rules of what is acceptable comment in an opening statement and how a trial judge may respond to counsel error. The majority concludes that "the circuit court did not exercise sound discretion in declaring a mistrial when it failed to give adequate consideration to the State's ability to refer to the defendant's silence and to the effectiveness of a curative jury instruction." Majority op., ¶71. It asserts that the circuit court's belief that a response in closing argument and a curative jury instruction would not rectify the prejudice to the state was "unfounded." *Id.*

¶166 Taking these points in reverse order, the court suggests that "a curative jury instruction that opening and closing statements are arguments, not evidence, would have cured any possible prejudice resulting from defense counsel's opening statement." *Id.*, ¶79. This determination seriously miscalculates the extraordinary circumstances of this case.

¶167 The notion of a cautionary instruction must be put in context. Before the State and defense counsel gave opening statements in this case, the court addressed the jury, saying:

> The State must prove every fact necessary to find the defendant guilty. The State must prove those facts through evidence. There are two kinds of evidence. First, there is what the witnesses say on the witness stand. Second, there are exhibits which

> are received into evidence. *The arguments of the lawyers are not evidence.*
>
> . . . .
>
> In considering your verdict, *disregard everything except the evidence received during this trial* and the law contained in my instructions. (Emphasis added.)

¶168 At the close of some trials, the court gives Wis JI—Criminal 157, "Remarks of Counsel" which reads in part: "Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." Attorney Gaskell argued that this instruction was the correct instruction to give the jury.

¶169 There is presently a jury instruction on "Opening Statements," Wis JI—Criminal 101, which reads: "The lawyers will now make opening statements. The purpose of an opening statement is to give the lawyers an opportunity to tell you what they expect the evidence will show so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence." This instruction was not given before opening argument. The instruction did not read the same way in March 2000, and an earlier version may not have been available to the court because it was relatively new.

¶170 As noted above, the court proposed an instruction that read: "The jury is not to consider any statement of certain facts made in opening statements when such facts were not supported by evidence received during the course of this trial." This was the only proposed instruction under consideration in the conference that went beyond Wis JI—Criminal 157.

¶171 The truth is, this instruction would not have undone the damage of defense counsel's opening statement. First, as worded, it applied to both the defense and the State. Second, it was not materially different from the boilerplate instructions cited above. Third, it was highly unlikely to erase the jury's understanding that the defendant had been married, had three children, had testified before, and had a story that conflicted with the victim's story. As the circuit court patiently explained, the jury had a "reasonable alternative in their minds." Consequently, I do not see how any court could conclude that the circuit judge was acting irrationally or irresponsibly in believing that this cautionary instruction would not solve the problem.

¶172 The suggestion of a "measured response" in the State's closing argument is also problematic. The court mysteriously pronounces that "[t]here are circumstances ... when an accused 'opens the door' to a measured response by the prosecuting attorney [and t]he defendant opened the door in the instant case." Majority op., ¶74. However, the majority provides no guidance for future cases as to when that "door" opens, or what a similarly situated prosecutor could permissibly say during her closing argument.[10] In fact, the State could not have pointed to any explicit language in the defendant's opening statement in which defense counsel promised that the defendant would testify. Instead, the court

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[10] When relying on the "invited response doctrine," the prosecution treads on extremely thin ice. Even when her response is invited, the prosecutor must take care not to "unfairly prejudice" the defendant under the totality of the circumstances. *United States v. Young*, 470 U.S. 1, 12 (1985). The Court has also advised prosecutors to request a curative instruction in lieu of an oral response to perceived impropriety on the part of the defense. *Id.* at 13.

hints at the possibility of a response on the defendant's silence, then pulls back with the observation that the propriety of prosecutorial comment must be decided "case by case." *Id.* This observation can only have a chilling effect on a prosecutor's rebuttal.[11] The majority is more comfortable relying on prosecutorial remarks that draw "the jury's attention to the distinction between argument and evidence." *Id.*, ¶76. However, such comments would be far more effective in a case in which the defendant himself gave the opening statement (*see State v. Johnson*, 121 Wis. 2d 237, 242, 358 N.W.2d 824 (Ct. App. 1984)), than here, where the defense counsel was the culprit and had the assurance of an instruction stressing the defendant's absolute constitutional right not to testify.

¶173 The prosecutor inquired what she could say about the defense attorney's fictional tale. She declared that she had "every intention" not to be kind to Attorney Gaskell. And the majority now asserts that, "Any prejudice to the State by defense counsel's opening statement would be outweighed by defense counsel's loss of credibility with the jury for his unsubstantiated opening statement." Majority op., ¶78.

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[11] Under any circumstances, the prosecutor must tightly circumscribe her comments during closing argument. For example, the Supreme Court has held that a comment such as "[t]hese things [the defendant] has not seen fit to take the stand and deny or explain" is improper. *Griffin v. California*, 380 U.S. 609, 611 (1965). Even a comment that the prosecution's case is unrebutted or undisputed may be seen as impermissible if, as here, the defendant is the only witness who could conceivably rebut or dispute the prosecution's case. *See United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996).

¶174 However, the more effective the prosecutor's commentary, the more likely Moeck would have had a claim for ineffective assistance of counsel if he were convicted. *See Barrow v. Uchtman*, 398 F.3d 597, 606-07 (7th Cir. 2005), and *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257-60 (7th Cir. 2003), for the proposition that unfulfilled promises by defense counsel to present personal testimony from a criminal defendant are highly suspect under *Strickland v. Washington*, 466 U.S. 668 (1984).

¶175 During the instructions conference, the court weighed cautionary instructions, the possibility of prosecutorial comment in the closing argument, and the nature of the prejudice to the State. The court heard contrasting views from the two sides. The court saw and heard the defendant refuse to waive objection to prosecutorial comment. The court had read case law on improper comment in opening statements and had asked the court reporter to read back a portion of the opening statement.

¶176 Against this background, the majority's conclusory determination that the circuit court erred as a matter of law in its exercise of discretion is a virtual repudiation of the sound policies outlined in *Arizona v. Washington*. The Double Jeopardy Clause of the United States Constitution does not mandate this result.

¶177 For the foregoing reasons, I respectfully dissent.

¶178 I am authorized to state that Justice JON P. WILCOX joins this opinion.

COURT OF APPEALS DECISION DATED AND FILED

2004 WI App 47

February 5, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0002-CR
STATE OF WISCONSIN

Cir. Ct. No. 97CF000468
IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD A. MOECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL KIRCHMAN, Judge. *Reversed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1. DYKMAN, J. Richard A. Moeck appeals from a judgment of conviction and an order denying postconviction relief. He asserts that his fourth trial constituted double jeopardy because there was no manifest necessity to order a mistrial in his third trial.[1] We agree that the fourth trial vio-

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[1]Moeck also argues: (1) the State's thirty-three month delay in testing evidence violated his rights to due process, to present a defense, against self-incrimination, and to compulsory process *(footnote continued)*

lated Moeck's constitutional protection against double jeopardy and reverse.

BACKGROUND

¶2. This case has an extensive history. Moeck was tried four times on charges including two counts of sexual assault, false imprisonment, intimidating a victim, and robbery. We omit the details of these charges because they are not probative of the issues on appeal. We focus on the third trial, where the pertinent facts concern Moeck's opening statement and the trial court's deliberation regarding the mistrial. Moeck's third trial was held before Judge Dennis Montabon.

¶3. Moeck's opening statement provided an alternate theory for what happened during the alleged assault. His counsel told the jury that the alleged victim arrived at Moeck's home in the middle of the night under the influence of drugs and asked for a place to sleep, but no sexual acts occurred between him and the alleged victim. Moeck never presented any evidence at trial, however, to support this alternate theory. After the State rested its case, Moeck decided not to testify. His counsel asserted that he did not know Moeck would not testify until after the State presented its case.

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under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and art. 1, secs. 7 and 8 of the Wisconsin Constitution; (2) the State's closing argument violated these same rights; and (3) his counsel was ineffective. He also brings to our attention *State v. Zimmerman*, 2003 WI App 196, 266 Wis. 2d 1005, 669 N.W.2d 762, *review denied*, 2004 WI 20, ___ Wis. 2d ___, 675 N.W.2d 805 (Wis. Jan 23, 2004) (No. 02-3097) decided after briefing was completed. Because the double jeopardy issue is dispositive, we need not address these arguments or consider *Zimmerman*.

¶4. At the close of the trial, the State requested that the trial court instruct the jury to disregard the unsupported theory Moeck proffered in the opening statement. Moeck asserted that the court could resolve the problem with a jury instruction.

¶5. The trial court considered Moeck's opening statement improper, reasoning that a defendant cannot tell a jury what the evidence will show and then not show it. It maintained that Moeck should have reserved his opening statement until after the State's case if he was considering not testifying. The trial court believed that the State was "in a bind in argument because they can't directly comment on the defendant not testifying" because of the right not to incriminate oneself. The trial court then proposed a jury instruction to resolve the impropriety, which read: "Remarks of the attorneys are not evidence. If the remarks implied the existence of certain facts not in evidence, disregard any such implication and draw no inference from the remarks." However, it gave the State the option of choosing between the jury instruction and a mistrial:

> THE COURT: Do you want to go ahead or not? I mean, I told [the State], it's on the record, I'm not gonna take it back, I think under—the State under the circumstances now would be entitled to a mistrial if they wanted one. My logic for that is that scenario is in the jury's mind without subject, as we do in trials, to cross-examination.
>
> [THE STATE]: I think I'm gonna ask for a mistrial, Judge. I'm not gonna be able to erase those facts. I can't argue them on—in my oral argument because I didn't have a chance to cross-examine him about it. It's not even out there before the jury.

The trial court declared a mistrial.

¶6. Prior to his fourth trial, Moeck moved to dismiss the complaint on double jeopardy grounds. The trial court denied the motion in a written opinion. Moeck petitioned this court for leave to appeal. We granted the petition and summarily affirmed, reasoning that the trial court's written opinion "applie[d] the proper legal standard to the relevant facts and reache[d] the correct conclusion." However, we failed to review the transcript showing the trial court's reasoning when it granted the State's request for a mistrial.

¶7. At the hearing on Moeck's motion to dismiss, Moeck told Judge Montabon that he wanted a speedy trial, and complained that he had been subjected to prosecution for over three years. Because the trial court's calendar was filled, the case was assigned to Judge Michael Kirchman. At Moeck's fourth trial, the jury convicted him of all charges. In motions after verdict, Moeck asserted that the fourth trial constituted double jeopardy. Judge Kirchman denied the motion in a written opinion.

STANDARD OF REVIEW

¶8. This appeal requires us to review whether the trial court erred when it determined there was a manifest necessity to terminate the third trial. We must first determine which trial court decision we review. Moeck's notice of appeal shows that he is appealing from the judgment of conviction, sentence, and order denying postconviction relief, which are all Judge Kirchman's decisions. Ordinarily, we would review those decisions. But *State v. Seefeldt*, 2003 WI 47, ¶13, 261 Wis. 2d 383, 661 N.W.2d 822 (citation omitted), holds otherwise:

> A circuit court's exercise of discretion in ordering a mistrial is accorded a level of deference that varies depending on the particular facts of the case. Regardless of the level of deference to be applied,

> an appellate court must, at a minimum, satisfy itself that the circuit court exercised sound discretion in ordering a mistrial.

This language from *Seefeldt* leaves no alternative to reviewing the transcript of Judge Montabon's decision when he granted the State's request for a mistrial, despite the fact that we are reviewing a judgment of conviction and an order rendered by Judge Kirchman.

¶9. We adhere to the following guidelines when reviewing the trial court's discretion:

> Sound discretion means acting in a rational and responsible manner. Sound discretion includes, without limitation, acting in a deliberate manner taking sufficient time in responding to a prosecutor's request for a mistrial. It requires giving both parties a full opportunity to explain their positions and considering alternatives such as a curative instruction or sanctioning counsel. Sound discretion is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law or does not reason its way to a rational conclusion.

Id., ¶36. The Wisconsin Supreme Court applied these guidelines in *Seefeldt*, 261 Wis. 2d 383. The court did not specify exactly what level of deference it gave the trial court's decision "because, regardless of the level of deference, [it] determine[d] that the circuit court did not exercise sound discretion in ordering the mistrial." *Id.*, ¶34. It clarified, though, that cases where the prosecutor requests a mistrial do not always require strict scrutiny. *Id.*, ¶33. It declared such a rule too broad; rather, the level of deference depends on the facts of the case. *Id.*

¶10. For the reasons discussed below, we conclude that the trial court erroneously exercised its discretion; even great deference would not alter our conclusion.

DISCUSSION

¶11. Moeck asserts that the fourth trial violated his right against double jeopardy because there was no manifest necessity to terminate the third trial. He offers several reasons for why the opening statement was lawful. Primarily he argues that his attorney made his opening statement with the reasonable expectation that Moeck would testify. He notes that he had testified in two of his other trials. He also argues that a curative instruction would have adequately dispelled any prejudice resulting from the opening statement. He claims the trial judge did not make a reasoned determination that a mistrial was necessary, as opposed to a curative instruction.

¶12. We turn to *Seefeldt* for guidance on this issue. In that case, the State moved for a mistrial because the defendant violated a pretrial order by mentioning other acts evidence in his opening statement. The trial court granted the State's motion because it determined a curative instruction could not remove the prejudicial impact of the statement. *Id.*, ¶9. The supreme court concluded that the trial judge did not exercise sound discretion because the defendant's controversial statements "would likely have been admissible during trial and the record does not reflect that the judge considered whether the evidence would ultimately be admissible." *Id.*, ¶38. Additionally, it found the trial court's deliberation to be inadequate:

> [T]he trial judge did not provide sufficient opportunity for the parties to present, and for the judge to consider, arguments regarding whether a mistrial should be ordered and the possible alternatives to a mistrial.

Id. The brief hearing the trial court held did not allow the parties "a full opportunity to explain their positions on the propriety of a mistrial." *Id.*, ¶42. It also considered the trial court's reaction to the violation of the pretrial order to be severe:

> We recognize that it appears that defense counsel violated a pretrial order when he made the statements . . . . However, this is not a basis for a mistrial unless the violation creates that high degree of necessity required by the double jeopardy clause. . . .
>
> Further, although the trial judge expressed his belief that no cautionary instruction could cure the improper comment, this belief seems to be unfounded because the evidence was likely admissible. . . . [T]he record does not reflect that the trial judge explored alternatives to granting a mistrial, such as imposing sanctions on defense counsel.

Id., ¶¶40-41.

¶13. Applying *Seefeldt*, we conclude the trial court erred by not exercising its discretion. The record shows that the trial court allowed the State to determine whether there was manifest necessity to terminate the third trial.[2] Such discretion resides only with the judiciary. Further, the record does not support a determination that there was a high degree of necessity for a mistrial.[3] The trial court did not consider

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[2]The trial court asked the State: "Is that your final answer, Ms. Matousek?" When the State's attorney answered, "yes," the court declared a mistrial.

[3]"The Supreme Court refined its definition of 'manifest necessity' . . . [and] held that while the word need not be interpreted literally, a 'high degree' of necessity must be found

(*footnote continued*)

the alternative of imposing sanctions on counsel, if a sanction was warranted. The record also shows that the trial court would have considered its proposed jury instruction a proper cure, if the State wished to pursue that alternative.

¶14. The State asserts that a jury instruction would not have cured the opening statement because it would have reminded the jury that Moeck did not testify.[4] The State provides no authority for this argument. Moeck contends *Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420 (1969) controls this issue. In that case, the prosecutor failed to produce evidence he forecasted in his opening statement because a witness invoked his privilege against self-incrimination. *Id.* at 733. The Supreme Court reasoned that a curative instruction may suffice when the error was "no more than an objective summary of evidence which the prosecutor reasonably expected to produce." *Id.* at 736. It considered persuasive the fact that the jury was told the opening statement was not evidence. *Id.* at 735. The Wisconsin Supreme Court has likewise reasoned that "improper remarks by a prosecutor are not necessarily prejudicial where objections are promptly made and sustained and where curative instructions and admonitions are given by the court." *Hoppe v. State*, 74 Wis. 2d 107, 120, 246 N.W.2d 122 (1976). We consider these principles applicable here, where defense counsel has made assertions in an opening statement which were not borne out by the evidence. In light of the constitutional safeguards against prosecutorial miscon-

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'before concluding that a mistrial is appropriate.'" *State v. Barthels*, 174 Wis. 2d 173, 183, 495 N.W.2d 341 (1993) (quoting *Arizona v. Washington*, 434 U.S. 497, 506, 98 S. Ct. 824 (1987)).

[4]We find it curious that the State complains of harm to the defendant though the defendant would have been satisfied with the instruction.

duct, it is illogical that a prosecutor, but not defense counsel, may cure such a statement with a jury instruction.

¶15. Accordingly, we conclude a proper jury instruction would have resolved the issue. We also disagree with the State's contention that it was unable to address the unsupported assertions in its closing statement. The State could have quoted the proposed jury instruction to stress that opening statements are not evidence the jury could use in deliberations. This comment would not have violated Moeck's privilege against self-incrimination as the State suggests. An attorney's failure to produce promised evidence is not lost on a jury. The result can be devastating.

¶16. The State also argues that the trial court gave the parties ample opportunity to discuss the impact of the improper argument. It distinguishes *Seefeldt*, where the trial court declared a mistrial immediately following the offending argument, because the trial court here waited until the close of Moeck's evidence to declare a mistrial. We do not consider this distinction persuasive. Here, the trial court held a brief hearing immediately at the close of evidence, which is the first time the trial court knew that no evidence supported Moeck's statements. It declared the mistrial that same day, as in *Seefeldt*. And it let the State decide whether the court should grant a mistrial.

¶17. *Seefeldt* recognized the importance of fair deliberation on the issue of manifest necessity. Here, there was little deliberation because the trial court left the mistrial decision up to the State. The hearing in this case falls short of allowing the parties a full opportunity to argue the propriety of a mistrial.

¶18. The State also argues that the parties were able to fully present their positions at the hearing in front of Judge Montabon regarding Moeck's motion to dismiss. However, the purpose of giving the parties an adequate, pre-mistrial

opportunity to argue their positions is to make sure that the court considers all aspects in exercising its discretion. An opportunity to argue after that decision has been made and the jury dismissed does not serve that purpose. Even though Moeck and the State were able to argue their positions later, that does not change the fact that the trial court delegated the mistrial decision to the State after initially concluding that a curative instruction would have sufficed.

¶19. Finally, the State urges us to apply the law of the case doctrine. It argues that we have already rejected Moeck's double jeopardy challenges in his interlocutory appeal and postconviction habeas corpus action and that Moeck has not offered anything new to warrant a different result in this action. Moeck contends that we should not bind him to the law of the case because the Wisconsin Supreme Court decided *Seefeldt* after our prior rulings. He also notes that our prior rulings were summary dispositions that did not have the benefit of full briefing.

¶20. The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) (citation omitted). We are not bound to follow the doctrine, however. *Id.* at 38-39 (clarifying the doctrine is not "a rule to be inexorably followed in every case"). We may disregard it in the interest of justice or "in certain circumstances when 'cogent, substantial, and proper reasons exist.'" *Id.* at 39 (citation omitted).

¶21. Those circumstances are present here. When we reviewed Moeck's petition for review, we examined Judge Montabon's written order and not his oral decision on the State's motion for a mistrial. Though the two are similar in some respects, the oral decision makes clear that the trial

court left the mistrial decision up to the State. The trial court would have given a curative instruction had the State requested that instead of a mistrial. And the court reasoned that defense counsel's failure to produce evidence promised in opening statement necessitated a mistrial. Had we reviewed the transcript, we would have observed this.

¶22. In sum, we conclude that the record does not support a determination that there was manifest necessity to terminate the third trial. There was no such necessity: a curative instruction would have sufficed and the State could have reminded the jury that the trial court would instruct them that defense counsel's statements were not evidence. The State could have embellished and commented upon this instruction at length without infringing on or even mentioning Moeck's right not to incriminate himself.

¶23. We do not reach the underlying issue of whether a defendant's attorney may mention facts in an opening statement and then fail to support those facts at trial because the defendant fails to testify. The State does not address this issue on appeal, though defendant's decision not to testify was the reason the State gave at trial for desiring a mistrial. Thus, we have no guidance on how the defendant's ultimate decision whether to testify squares with his attorney's pretrial decision to make an opening statement before the State presents its case. *See State v. Albright*, 96 Wis. 2d 122, 133 n.8, 291 N.W.2d 487 (1980) ("The defendant should be given the ultimate decision on waiving the right to testify."). Forcing a defendant to choose between testifying and a mistrial because counsel has made an opening statement forecasting the defendant's testimony raises a question the parties have not briefed. Nor have the parties fully briefed whether defense attorneys must forego opening statements because they are not positive that their clients will testify. Instead, we conclude that the trial court erroneously exercised its discretion because, like the trial court in *Seefeldt*, it

did not exercise its discretion when it allowed the State to chose between a curative instruction and a mistrial, and by failing to explore alternatives to a mistrial.

By the Court.—Judgment and order reversed.

¶24. VERGERONT, J. (concurring). I write separately to comment on an issue referred to in ¶23—whether counsel acted improperly, as the trial court stated, in giving Moeck's version of events in opening argument and then not presenting evidence of that version. Although Moeck argues that the trial court erred in concluding this was improper, the State does not develop an argument in support of the trial court's conclusion. That is one reason we should not address the issue. However, the more important reason in my view—one that the majority opinion does not mention—is that under *State v. Seefeldt*, 2003 WI 47, ¶¶40-41, 261 Wis. 2d 383, 661 N.W.2d 822, even if a defense counsel's conduct is improper, that is not a basis for a mistrial unless that conduct creates the high degree of necessity required by the double jeopardy clause. In *Seefeldt* the court held that defense counsel's statements in violation of a pretrial court order were not a basis for a mistrial unless the violation created that high degree of necessity required by the double jeopardy clause. *Id.*, ¶40. Thus, whether or not defense counsel here should have done something other than what he did—and I am not suggesting that he should have—the trial court still had an obligation to exercise its discretion by exploring alternatives to a mistrial. *See id.*, ¶41. I agree with the majority opinion that the trial court here did not do that.

¶25. As for the reference in ¶23 to a defendant's right not to testify, neither the trial court nor the State has suggested that Moeck did not have the right not to testify. I therefore see no reason to mention this issue.

¶26. For these reasons, I respectfully concur.

[Opening Statement by Defense Counsel]

MR. GASKELL [defense counsel]: . . .

Ms. Matousek just gave her opening statement, ladies and gentlemen, and if her opening statement was consistent with what you're gonna hear today, we wouldn't even be here, but the evidence is gonna be significantly different and here are some of the things that are gonna be significantly different.

Number one, she didn't talk about any physical evidence. There is no physical evidence that this crime occurred. You're gonna hear also, ladies and gentlemen, that there was absolutely no investigation done, none by this officer (indicating), no investigation.

You're gonna hear Chris Sader, the alleged victim in this case, tell not two stories, sometimes three stories, three different stories regarding the same specific detail. Chris Sader has testified, as Ms. Matousek said, at previous hearings in this matter. Rich has done the same thing, and the only person in this case that has been consistent with their story and with their testimony is Rich (indicating). That consistent story is that he's a 250-pound construction worker. He's been married twice before. He's got three children and those marriages lasted approximately 17 years.

On this morning, ladies and gentlemen, what happened, Rich is asleep in his apartment. Chris Sader knocks on the door. Rich says it was 3:09 in the morning because there was a digital clock up on his refrigerator and he wakes up and he happens to notice the time. He recognizes Chris Sader from a meeting that they had a month ago at Kenny's Pub here in La Crosse and at that time they discussed casual marijuana use and Rich said, you know, if you're ever looking to sell some, you know, stop by. Chris Sader comes to Rich's apartment with marijuana looking to sell marijuana

that night to Rich. He also asks if he can crash at his place and, in fact, he does spend the evening at Rich's apartment. The reason he stays there is 'cause he says he's tired and he's high at that point. He tells Rich that he had taken a couple hits of LSD just prior to him getting to his apartment.

The next morning they wake up and they discuss this marijuana and Rich says, well, I only want 20 or $30 worth. Rich then goes out into the hallway where the bathrooms are. He doesn't have a bathroom in his apartment. It's out in the hallway. He goes out there. He comes back in, and he notices that the money that was on the counter is now gone. It's missing, and he asks Sader, well, where's the money, and Sader denies, well, I don't have the money. And he says, where's the money, and finally Sader says, okay, I've got it, and he pulls it out of his sock and gives him his money. At that point Rich is mad and he kicks and pushes him out of the apartment, kicks him out of the building, out the back fire door which is just outside of his apartment door.

At that point Sader is gone. Rich goes back into his apartment, grabs something to eat, goes back to sleep, and then he's awakened at 11 or a little after 11 o'clock by the police that morning and they execute a search warrant and Rich is arrested.

And that story, ladies and gentlemen, is the only story that's been consistent throughout this case. You're not gonna hear any evidence in regards to any kind of homosexual activity or any homosexual materials that were either found in Rich's apartment or nobody else is gonna come up here and say, yeah, I've had a – Rich Moeck's a homosexual. There's gonna – gonna be no evidence in regards to that.

There is going to be no evidence in regards to a motive to rob, take $40 or $50 from Chris Sader. The police execute a search warrant and they find $790 in cash in his apartment. Chris Sader is gonna say, well, he stole two $10 bills from

me. Well, in that $792 in cash there is no $10 bills that are found. In the $792 of cash, no $10 bills are found.

The story you're gonna hear, ladies and gentlemen, is Chris Sader alleges that he had contact with Rich on the street, that they had some conversation about pool, and they also had – supposedly Rich says two or three different times, do you have anything on you, do you have anything on you. Well, Chris Sader is gonna say, well, I assumed he was talking about drugs and, no, I told him I don't do that stuff and I don't do drugs, and then they walk back to Rich's apartment, according to Sader, through back alleys, dark back alleys. Rather than just walking down Third Street and go up Third Street to the entrance to his apartment, they go through the back alleys and up a dark fire escape, according to Sader. They get to the fire escape and somehow the fire escape (sic) opens up. It doesn't have a handle on the outside. There is no key to get in that fire escape door. Somehow they get in that door.

He tells the officer different times as to the reason he went there. First he says – he tells the officer that morning, well, he said we were just gonna go drink some beer, and then he testifies later on, well, he said he was gonna have a party there and he was kind of curious as to who he was so, therefore, I went with him. Then the next story is, well, no, he said that there was gonna be a party there with a bunch of people and there was a pool table there.

So, he's walking dark alleys with somebody that's just asked him about drugs, told him about a party and a pool table. They get up to the apartment. There is no party. There is no pool table, but that doesn't strike him as being odd and a situation that he should immediately leave.

Then we have Chris Sader telling us that for the next four and a half hours he's traumatized. He's struck numerous times and, again, his testimony about being struck changes.

One time it was six or seven times each time I looked at him. The next time, no, it was just six or seven times total. The next time it was, well, I was just hit two or three times. But through these threats, through being struck, through this alleged sexual assault, he's able to maintain an erection for four and a half hours.

Then we get to the end of this alleged assault, this alleged robbery. Chris Sader previously has testified that he's finally told that, okay, leave, you know, he's ordered out of the apartment by Rich after being assaulted for four and a half hours. He's finally told, you can go, get out of here, and he says, well, just a minute, I've got a knot in my shoe; I can't go yet; I've got a knot in my shoe (indicating).

Then he says that he picks his wallet up and somehow notices that $40 is missing, and rather than taking his shoe and his wallet and just running and getting the heck out of there, he argues not once, but twice, with him (indicating), where is my money; give me my money; I want my money.

Then he says he goes to the bottom of this fire escape. Remember, Rich says he pushes him out. He kicks him out of the building. He goes out the fire escape. At the bottom of the fire escape, rather than just running and getting out of there, again he wants us to believe that he was more concerned about his bike than he was getting out of there because he says, well, I got to get my bike, and he doesn't have any problem getting the combination undone, getting his lock off, and leaving.

Now, let's put this in perspective. The parking lot out here where you maybe parked this morning, just on the other side of that parking lot is where we're talking about. That's where Spanky's is. That's where Rich's apartment is. We're talking about a block from this building, and the police department is a half a block that way (indicating), but rather than grabbing his shoe and grabbing his wallet and just

running, he wants to sit there and argue with this guy that just assaulted him for four and a half hours. Does any of that make any sense?

There are between 30 – and I call them chapters. There is between 30 and 35 different chapters to this story, okay. And in those 30 to 35 chapters, in the majority, probably 90 percent of those chapters, Chris Sader has told different stories about the same detail. Nothing has been consistent in this whole case. I want to touch base on just a few of them and, ladies and gentlemen, some of these chapters are certainly more significant than others, and I grant you that, but even the ones we may say, well, gee, that's not really significant, well, it's inconsistent. Building blocks, ladies and gentlemen. How do you prove somebody that's been falsely accused, how do you prove them innocent?

He's either biking downtown up and down the sidewalks or he's walking his bike downtown as he told the police officer. Okay. Big detail? No. Is it inconsistent? Absolutely.

The meeting location. Where did these two meet when Mr. Sader alleges that he saw him on the street that night? His first testimony and his first report that he gives to the officer is it happened between Tom's Turkey and Happenings, which is a bar, and I believe that's just again two, three, maybe four blocks from where we are right this morning. He says that meeting happened between Happenings and Tom's Turkey. Happenings is north of Tom's Turkey. Then he says, well, it was on the corner south of Tom's Turkey, story number two. Then he says it was south of Tom's Turkey, a block south of there, and then he says it was at least a block south, at least a block south of Tom's Turkey. Well, the next block down, ladies and gentlemen, is .12 miles. That's approximately 211 yards, two football fields.

MS. MATOUSEK: Objection.

THE COURT: Yeah.

MS. MATOUSEK: This is argument.

THE COURT: Tell them what your evidence will show. Don't argue about it at this point.

MR. GASKELL: That is what the evidence is gonna show, Your Honor. Ms. Matousek indicated that and what Mr. Sader has previously testified to is that he was either on the right sidewalk or the left sidewalk when he heard Rich say, hey, you. Well, he's either across the street from him or he testifies on one occasion that he was on the same side as Rich and he's actually the one that came up to him on the sidewalk, biked right up to him and approached him, and then allegedly Rich says, hey, you. So, he's either right next to him saying, hey, you, or he's across the street being hollered at, hey, you.

Throughout all of this you will never hear Chris Sader say that he can even describe the shirt that Rich was wearing that night. He can't describe the color. He can't describe whether is it a sweatshirt; is it a pullover; is it a button-up; is it a pullout. He can't describe it and he's gonna say and he's testified previously, that shirt stayed on. The only thing that allegedly came off were Rich's pants. And the reason he can't describe the shirt is because when he showed up at Rich's and tried to sell drugs, Rich was asleep in his underwear and wasn't wearing a shirt that night.

Well, why go to this place? As I've said, he said, well, he was going one time to drink beer. One time he was going to go to the place because he was curious. Another time it was a party, people, pool table.

The couch that he sat on. There is two couches in Rich Moeck's apartment. He tells the officer that he sat on the couch and the kitchen area was directly behind that couch is what he told the officer. Then his testimony changes, well,

no, I was on a different couch. So, we've got a couch. We don't know which couch he is sitting on. Then the State says, well, he was sitting at an angle like this (indicating) watching a TV on the end of the couch after he's, again, walked these back alleys, gone up this dark fire escape, no pool table, no people, but he sits on the edge of the couch and he doesn't pay any attention supposedly to what's going on behind him and he sits there and he just pays attention to the TV set (indicating). He doesn't have any discussion with Rich. He doesn't pay any attention to what he's doing.

The TV. One time he testified and I believe it's his – the written statement, that Rich turned the TV on. Another time he testifies he turned it on. Another time he testifies that Rich told him to turn the TV on. Another time, last time, he says, well, I don't remember who turned the TV on. Again, is that important? Is that truly significant to this? Well, sure it is. It's a lot easier to tell the truth all the time than try to remember what you said before.

The magazines that are allegedly tossed down on this – this mattress while he is down there. In one sentence he says singular, he tossed a magazine down on the mattress, and in the next sentence he's talking about, well, no, it was a handful of magazines. He's flip-flopping back and forth throughout his testimony, previous testimony.

The oral sex that is allegedly performed. He tells the officer that the first time that it was performed was when he was standing up. He was standing up and fellatio was performed on him after he disrobed. The officer's report says, and then after that happened, then he was ordered down on this mattress, but then he turns around and says, no, that's not right, that's not what happened; all of the oral sex happened on the mattress. Then the officer – we talked somewhat at jury selection about impressions and interpretations, and the officer has previously testified that, well, it was my impres-

sion that he was standing up when he told me this. Well, it's – it's directly in his report that it happened – that happened first, then he's ordered down to the mattress.

The robbery. Chris Sader again has testified previously and you will hear it again today, that the robbery happens when he's up against the wall at the end of the – at the end of this whole thing. Okay. The other testimony is that he was down on the mattress and this happened, this robbery happened after the first time that oral sex was performed. Now, how can that be? How do you not know where it happens? How do you not know if it was right at the beginning of this incident or if it was right at the end of the evening after four and a half hours.

The money. He doesn't know how much money he lost. He tells the officer, I lost $40. The denominations were a twenty and two tens. Then he says it was between 50 and 60. Another time he testifies, well, it's between 40 and 60. Then all of a sudden now, I don't recall what the denominations were. Well, of course, he doesn't recall what the denominations –

MS. MATOUSEK: I'm going to object as argumentative. This is going way beyond what the evidence will show.

THE COURT: Tell them what you believe the evidence will show. You will have ample opportunity to argue. Go ahead.

MR. GASKELL: In regards to what the evidence is gonna show, ladies and gentlemen, is that in his previous testimony, in his previous statements in regards to the marijuana is that he told the officer he had a puff, one singular puff of a marijuana cigarette. In his written statement, in his written statement after he talks to the officer that morning, the evidence is gonna show that he wrote in his

written statement he had three puffs of marijuana. Then he's testified that, well, it was either two or three puffs of marijuana, and then also in regards to this he's gonna tell you, well, that Rich held it up to him so he could puff on this marijuana cigarette one time, and then another time he's gonna tell us and he's testified previously that Rich handed him this marijuana cigarette.

The paper sack that allegedly Rich walks out of the apartment with that morning. One time, and the evidence will show, that Mr. Sader previously testified that the knife was in the sack, and then you will find that his testimony again changes and he says, no, I didn't see anything in the sack, nothing was sticking out of the sack.

He goes to the hospital after this is all done. The officer takes him there. He says, no, I'm not interested in talking to anybody about this, but more critical is that the evidence will show a complete lack of investigation from this – this point forward. There are no tests that are run at the hospital. You will hear about no examinations that were done at the hospital, no sexual assault examinations. You will hear that Chris Sader went directly from Rich – allegedly from Rich's apartment straight to the police department, didn't change clothes, didn't shower in between. No saliva swabs taken, no DNA run, complete loss of physical evidence because they simply didn't do it.

You're gonna hear Mr. Sader testify about past lies that he's told to police officers. One of those was in January of 1995. One of those was two weeks later, February of 1995, a completely different incident. You're gonna hear him testify that he lied to his roommate in a roommate interview. You're gonna hear that just – just over three months ago, November of 1999, again another incident with law enforcement where he completely lied to them.

In regards to the law enforcement officer, you're going to hear that he never questioned any of the inconsistencies between what was in his report, what Sader verbally told him, and what was in his written report, never questioned those at all, never questioned Mr. Sader about, well, was it – was it one puff or was it three puffs like he'd written here. Well, you told me you were struck numerous times but you never wrote that in your report, and there is other inconsistencies that weren't discussed or even questioned.

The law enforcement officer is going to get up here today, because he's done it previously, and he's gonna tell you about his interpretations, his impressions, and his paraphrasing in his police report, and he has to do that because the alleged victim's story, the details, are wholly inconsistent. You're gonna hear that law enforcement simply took his story at face value and did nothing more.

There was nothing found in the search warrant. Ms. Matousek indicated a couple knives were found. Yes, they were, but they were small knives compared to this 12-inch knife that Mr. Sader talks about. There was a women's magazine, a nude women's magazine that was found as well as I believe they refer to it as a pamphlet that was found in the apartment, but Mr. Sader has never identified those magazines as ones that he looked at. There is no drugs found in the apartment, nor is there any drug paraphernalia, even a roach clip, even a paper, no hint at all of any drugs or drug paraphernalia in the place.

The officer is gonna tell you this morning that, yeah, there were trash cans and there were dumpsters in the – at the bottom of the fire escape in this back alley, and he's gonna tell you that, well, he just kind of peeked into the dumpsters to see if there was anything in there, but he never bothers getting his hands dirty, never bothers looking for any physical evidence that may be back in that back alley, if you

believe Chris Sader, because he found nothing in the search warrant. He never searches – there is three bathroom areas out in that hallway. He never searches any of those. He never talks to any neighbors; did you see anything; did you hear anything.

What you are gonna hear this morning, ladies and gentlemen is – and I don't know what you are gonna hear from Mr. Sader, I truly don't. I'm not sure which detail he's gonna cling to this morning, which story he's gonna go with this morning, but I do know that he has been totally inconsistent which means he's lied under oath in the past, and you're gonna hear that the police officer ran with those and did absolutely no investigation when there was physical evidence or witnesses that was there. They want you to hang him on Mr. Sader's story. You're gonna find, as I do, that it's not truthful, that he has habitually lied to the police officers in the past –

MS. MATOUSEK: Objection, this is argumentative again.

THE COURT: Sustained.

MR. GASKELL: At the end of this case, ladies and gentlemen, end this for Rich, acquit of all these charges. Thank you.

[Discussion and Oral Decision on Motion for Mistrial]

THE COURT: Please be seated. Very well, the record should show we are in the courtroom outside the presence of the jury, that counsel have been furnished with copies of proposed jury instructions. Does the State have any objection to the instructions as proposed?

MS. MATOUSEK: No, but I do have an additional one that I would like to request –

THE COURT: What?

MS. MATOUSEK: – Judge, and that's one that in this case Mr. Gaskell got up in his opening statement and he argued in the opening statement about facts that are in no way in evidence concerning the fact that the defendant was asleep. At – at 3:09 Sader knocks on the door. He recognizes Sader from Kenny's Pub. Sader was there to sell marijuana. He had told the defendant he had had hits of LSD and needed a place to sleep. There was money missing. I mean, he went through the whole scenario, and we have heard that scenario before when the defendant has testified at the previous trials. Now, however, the defendant has opted not to testify and all of that evidence is in there from the opening statement. There has been no evidence presented at all to corroborate that and now he doesn't put the defendant on to make any effort to corroborate it, so I think that's completely unethical, but aside from that, I think that there has to be an instruction to the jury that they are to disregard that and not consider any of that portion of the opening statement.

THE COURT: Mr. Gaskell?

MR. GASKELL: Yeah, realizing –

THE COURT: Huh?

MR. GASKELL: Opening statements, first of all, aren't evidence, number one. Number two, when we make a decision to put the defendant on the witness stand or not is subsequent to the State's or during the State's case. Unethical? I can't tell what I believe my defendant is gonna testify – what my client is gonna testify to? Of course, I can do that. We still have a constitutional right not to take the witness stand at the end of that.

THE COURT: There is no pattern instruction.

MS. MATOUSEK: No.

THE COURT: Well, Mr. Gaskell, I don't think your statement of the law is correct. You can't tell the jury what the evidence is gonna show and then don't show it.

MR. GASKELL: Well, Your Honor, I don't – I don't think that's – I don't think that's accurate either. If I'm presenting a case and I don't know whether, in fact, my client is gonna get up on the witness stand or not –

THE COURT: Then you can't give his – his or her version of the events.

MS. MATOUSEK: You've got to wait till closing to do that.

THE COURT: If there is going to be no evidence. (Pause.)

MR. GASKELL: Your Honor, I do note under 1296, bail jumping is included in the last paragraph.

THE COURT: Where?

MR. GASKELL: Under 1296. These aren't – mine isn't numbered anyway, so I don't know what page, but under 1296.

THE COURT: Oh, I see what you mean.

(Pause.) Yeah, it seems to me the State is in a bind, you know, and might well be entitled to a mistrial. This is the instruction I propose to try to correct that, but the State is gonna be in a bind in argument because they can't directly comment on the defendant not testifying –

MS. MATOUSEK: Right.

THE COURT: – so . . . The jury is not to consider any statement of certain facts made in opening statements when

such facts were not supported by evidence received during the course of this trial, is the instruction I would propose.

MS. MATOUSEK: Can I have about five minutes? I would like to confer with Mr. Horne about whether or not I should be asking for a mistrial in this case.

THE COURT: Fine.

MS. MATOUSEK: Thank you.

THE COURT: Do you want to take this down so you can show him?

MS. MATOUSEK: Yes, I would. Thank you.

THE COURT: Show him what I proposed. It's the second one.

MS. MATOUSEK: Thank you.

(A recess was taken.)

THE COURT: Very well, the record should again reflect we are in the courtroom outside the presence of the jury.

MS. MATOUSEK: Judge, I had a chance to talk with Chris Sader. He's indicated to me that he's willing to do this a fourth time if need be. I need to make clear, though, before I make that decision to request a mistrial, is exactly how far would the Court be allowing me to go as far as statements in a closing argument commenting on the fact that there were, you know, basically a fictional tale presented in the opening statement and there was no evidence presented and no effort to present evidence to support that? I would have every intention of not being very kind to Mr. Gaskell in that closing argument regarding that, and I think I should have the opportunity to, you know, at least make that statement, that a fictional tale was presented and there has been no

effort to support that with any evidence. He's basically slinging mud at a victim without any effort to support his statements.

THE COURT: Mr. Gaskell?

MR. GASKELL: Your Honor, the jury instruction 157 talks specifically about, remarks of attorneys are not evidence, and if they implied the existence of certain facts not in evidence, that the jury is supposed to disregard any implication and draw no inference from those facts. Opening statements are not evidence, Your Honor. If we actually in any way, shape, or form believe that the jury is gonna hang their hat on something that I said ten hours ago, I think that's an absurd notion. They're gonna base it on whether they believe Chris Sader or not.

THE COURT: It's not quite that simple, Mr. Gaskell. They have a reasonable alternative in their minds now before them with no evidence whatsoever to support it. Reasonable or not, they have an alternative.

MS. MATOUSEK: I haven't had a chance to do any cross-examination. I can't include that in any – any part of my closing argument as I have in the past two trials.

THE COURT: I'm not as wise as the combined wisdom of the Supreme Court, but it would seem to me as long as you don't say, you know, the defendant didn't get up here and tell us that, or words to that effect, you're all right, as long as there is absolutely no evidence about it, no proof.

MS. MATOUSEK: I can say there was absolutely no evidence or no proof rather than directing – directly saying the defendant didn't get up here and say this?

THE COURT: I think if you say, the defendant didn't get up here and say this, we will likely be trying it again. That's the best I can do off the top of my head. I read about

misconduct during opening statements. It's clear I think that the Court can grant a mistrial. The one was a defendant's case where a court granted a mistrial after it was shown while the jury was deliberating that with apparently absolute certainty that two of the defense witnesses committed perjury, and the other one was about prosecutorial misconduct. That's what I can find that's close, but I mean –

MR. GASKELL: I think if Ms. Matousek – if she wants to argue that there is no – that we didn't present any supporting evidence based on my opening statement, I mean, to move this thing along –

MS. MATOUSEK: Are you waiving any objection to that?

THE DEFENDANT: No.

MR. GASKELL: As long as –

THE DEFENDANT: No. Nope.

THE COURT: I'm gonna make it real simple –

MR. GASKELL: Well, Your Honor, I think you're right, as long as she doesn't say, the defendant didn't get up on the stand and say that – I mean, I think she can say that I indicated that in opening statement and that I didn't present any testimony to back that up or evidence to back that up.

THE COURT: I think she can under the circumstances, too. Do you want this other instruction also?

MS. MATOUSEK: Yes.

THE COURT: Do you want to go ahead or not? I mean, I told her, it's on the record, I'm not gonna take it back, I think under – the State under the circumstances now would be entitled to a mistrial if they wanted one. My logic

for that is that scenario is in the jury's mind without subject, as we do in trials, to cross-examination.

(Pause.)

MS. MATOUSEK: I think I'm gonna ask for a mistrial, Judge. I'm not gonna be able to erase those facts. I can't argue them on – in my oral argument because I didn't have a chance to cross-examine him about it. It's not even out there before the jury.

THE COURT: Any comment, Mr. Gaskell?

MR. GASKELL: I think I have already made my comments, Your Honor. The Court believes that a mistrial is appropriate in this matter. I disagree with that. I think that a jury instruction resolves that matter, and as a matter of fact, the standard jury instruction –

THE COURT: Is that your final answer, Ms. Matousek?

MS. MATOUSEK: Yes.

THE COURT: I should also note for the record so it's on the record, I had the court reporter read back to me what was said. It was a detailed statement of dope and out the door and the money and everything else. It's my opinion, Mr. Gaskell, that, I don't know if you want to call it misconduct, unethical, or whatever, you can't state in opening statements that this is what happened and have no evidence thereafter to show what happened.

MR. GASKELL: Well, Your Honor, we still have a right to make a decision after the State presents its case.

THE COURT: Yeah, then you don't talk about your version of the facts in the opening statement if you are not certain you're gonna prove them. "Comments may not include facts – this is from the Benchbook. I mean, it's basic law. "Comments may not include facts attorney in good

faith doesn't expect to prove." And if you don't know at the time you make your opening statement that your client is going to testify, it's not made in good faith if you relate to the jury what he's gonna say. It's as simple as that.

MR. GASKELL: You are saying that a decision can't be made subsequent to opening statement?

THE COURT: You can reserve your opening statement till after the State's case. It's standard procedure. Motion for a mistrial is granted.

THE BAILIFF: Bring the jury in?

THE COURT: Huh?

THE BAILIFF: Bring the jury in?

THE COURT: No, I will go talk to them.

MR. GASKELL: Your Honor, can I address bail, or how quickly are you going to turn around and –

THE COURT: I don't know. It won't be very quick if I do it. I have to decide in my own mind whether I have enough left to do this another time regarding Mr. Moeck, so . . . They will let you know. The bail will stay where it is.

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY
BRANCH 3

STATE OF WISCONSIN,
Plaintiff,
v.
RICHARD MOECK,
Defendant.

MEMORANDUM DECISION AND ORDER

Case No. 97-CF-468

This matter is before the Court on defendant's motion to dismiss pursuant to the Wisconsin State Constitution and the United States Constitution, which prohibits the state from putting a defendant in jeopardy twice for the same offense. *Arizona v. Washington*, 434 U.S. 497, 503 (1978). The defendant argues that the granting of a mistrial based on the opening statement made by defense counsel was an abuse of discretion and that a curative instruction to the jury would have been appropriate. Because the Court finds that there was a manifest necessity to grant a mistrial, the defendant's motion to dismiss is denied.

FACTS

On March 15, 2000, Richard Moeck was tried for the third time on charges including two counts of sexual assault, false imprisonment, intimidating a victim, and robbery. A jury was impaneled and the defendant was represented by attorney Timothy Gaskill. In Mr. Gaskill's opening statement, he presented facts to the jury regarding the defense's version of the events in question.

Mr. Gaskill presented the following facts in his opening statement. The defendant was asleep in his apartment; Mr. Sader came to the defendant's apartment at 3:09 a.m.; the defendant recognized Mr. Sader from a meeting they had had a month ago at Kenny's Pub where they had discussed casual marijuana use; at this meeting the defendant said, "you

know, if you're ever looking to sell some, you know, stop by"; Mr. Sader came to the defendant's apartment with marijuana looking to sell it to the defendant; Mr. Sader asked if he could "crash" at the defendant's apartment because he was tired and high; Mr. Sader told the defendant he had taken a couple hits of LSD just before arriving at the defendant's apartment; the next morning the defendant and Mr. Sader both awoke and discussed the sale of marijuana; upon coming back from the bathroom, the defendant noticed that money on the counter was gone; Mr. Sader denied taking the money but after more questioning by the defendant, Mr. Sader admitted to taking it and gave it back to the defendant; the defendant got mad and kicked Mr. Sader out of the building; Mr. Sader was gone; the defendant ate something and went back to sleep; the police came to the defendant's apartment around 11 o'clock, awoke the defendant, executed a search warrant, and arrested the defendant.

At trial, the defendant did not testify and Mr. Gaskill failed to present any evidence of the facts that he provided to the jury in his opening remarks. Before the jury instruction was given, the State of Wisconsin, represented by Attorney Robyn Matousek, requested a mistrial. The State argued that the defense introduced an alternative version of the events but failed to provide any proof of those events at trial. The Court granted the State's motion. The defendant now makes this motion to dismiss on the grounds of double jeopardy.

DISCUSSION

"[T]he Supreme Court has permitted limited exceptions to the general prohibition against double jeopardy when the trial is terminated before reaching a final resolution on the merits but the state can demonstrate a "manifest necessity" for asking for a mistrial." *State v. Barthels*, 174 Wis. 2d 173, 182, 495 N.W.2d 341, 345-6 (Wis. 1993) (citing *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *State v. Copening*,

100 Wis. 2d 700, 709, 303 N.W.[2d] 821 (1981)). The manifest necessity test provides that "courts of justice may discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act. . ." *Id.* at 183. The word need not be interpreted literally, a "high degree" of necessity must be found before finding a mistrial is appropriate. *Id.* "Determining whether a "high degree" of necessity exists is a matter of discretion for the trial court." *Id.*

Here, the Court must determine whether or not Mr. Gaskill's opening remarks to the jury constituted a high degree of necessity for a mistrial despite the defense's opposition. The Court finds that Mr. Gaskill's opening statements satisfy the manifest necessity test. It is settled law that opening statements "should be confined to statements based on facts which can be proved and should not include facts which are plainly inadmissible, and which [one] cannot or will not be permitted to prove, or which [one] in good faith does not expect to prove. . ." *Beavers v. State*, 63 Wis. 2d 597, 606, 217 N.W.2d 307, 312 (Wis. 1974).

Mr. Gaskill clearly introduced a detailed set of facts describing what took place between the defendant and Mr. Sader. However, at no time during trial did the defense provide any evidentiary proof of those stated facts to support its contention. Although a defense attorney is not required to know at the beginning of trial whether or not his client will testify, if there is doubt, the attorney should not, in good faith, introduce facts in an opening argument that he may not prove at trial or the attorney should reserve his opening statement until after the State's case has been presented. If Mr. Gaskill was unsure as to whether or not Mr. Moeck would testify when he presented his opening statement, he should not have brought out Mr. Moeck's version of the incident in his opening statement.

ORDER

For the above stated reasons:

The defendant's motion to dismiss is DENIED.

Dated at La Crosse, Wisconsin, this 16th day of August, 2000.

BY THE COURT:

/s/ Dennis G. Montabon
Dennis G. Montabon

cc: Timothy Gaskill
Robyn Matousek

No. 05-182

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF WISCONSIN – PETITIONER

VS.

RICHARD A. MOECK – RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David D. Cook
N3927 County Highway J
Monroe, Wisconsin 53566
608-325-3350

Attorney for Respondent

QUESTION PRESENTED

Did the Wisconsin Supreme Court contravene *Arizona v. Washington*, 434 U.S. 497 (1978) by holding that the trial court failed to exercise sound discretion in granting a mistrial in a case in which the defense opening argument summarized, in good faith, the anticipated testimony of the defendant and where the defendant ultimately decided to not testify?

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SUMMARY OF ARGUMENT

Review should be denied because the Wisconsin Supreme Court carefully adhered to this Court's standards for appellate review of mistrial decisions set forth in *Arizona v. Washington*, 434 U.S. 497 (1978). Consistent with *Washington*, the Wisconsin court first determined the proper level of deference to accord the trial court decision, based on the nature of the circumstance giving rise to the mistrial. The Wisconsin court concluded that a high level of deference, "special respect," should be accorded the trial court because, as in *Washington*, the mistrial decision was related to the defense opening argument. The Wisconsin court then addressed, as required by *Washington*, whether "sound discretion" was exercised by the trial court, concluding that "sound discretion" was not exercised because the trial court erred as a matter of law with regard to the prosecutor's ability to effectively address, in closing argument, the failure of the defense to produce the admissible testimony anticipated in the defense opening statement. Following *Washington*, the Wisconsin Supreme Court could have relied on additional grounds for reversing the mistrial decision, including that the trial court erred in finding that the defense opening statement was improper, that there was substantial reason to believe that the State sought a mistrial to salvage a failed prosecution, that the trial court erroneously delegated the mistrial decision to the prosecutor, and that the trial court failed to act deliberately by allowing the parties an opportunity to research and explain the legal authorities relevant to the mistrial decision.

Review should also be denied because no conflict whatever exists between federal jurisdictions or State courts with regard to mistrials granted after the defense, in good faith, summarizes anticipated, admissible testimony of a defendant in an opening argument but then fails to call the defendant to testify. The State has not produced a single appellate case from any State or federal court that has been decided contrary to the Wisconsin Supreme Court's decision. Of the few cases that have addressed this issue, each has been decided consistently with the decision in Moeck's case. The supposed "conflict" among the circuits and States that the petition outlines, using cases that address mistrial decisions based on a broad variety of trial errors, actually reflects that appellate courts are *following* the mandate of *Arizona v. Washington*, and determining what level of deference, along a spectrum ranging from "strict scrutiny" to "great deference," should be accorded a mistrial decision, based on the nature of the circumstance giving rise to the mistrial request.

Finally, review should be denied because no issue of national importance is presented. Lawyers frequently present, in good faith, opening statements that refer to anticipated, admissible testimony that, for a variety of reasons, is not ultimately produced at trial. No authority exists, either in the cases, recognized practice standards, or academic literature, suggesting that such a development at trial might be grounds for a mistrial.

STATEMENT OF THE CASE

The State's presentation of evidence at Moeck's third jury trial was a disastrous failure of proof. As with many sexual assault allegations, the case against Moeck rested entirely on the credibility of the complainant, Christopher Sader. The State also presented testimony by a patrolman, Officer Abraham, the sole investigator of the allegation, who uncovered no physical evidence or other corroboration of Sader's account. This failure of proof is the essential factual background for understanding Moeck's decision that he need not testify, and the State's decision to accept the trial court's offer to grant a mistrial if the State desired one: both Moeck and his counsel and the State realized that the State had failed to prove its case. Notably, the State's petition to this Court completely ignores this essential factual setting.[1]

Testimony of the Complainant

The complainant, Christopher Sader, was a 23 year old probationer at the time of the alleged incident (R244:115, 158), with five prior criminal convictions (R233:89), and a history of lying. At Moeck's third trial, Sader testified that in January 1995, he had lied to a police officer about his name; that in February 1995, he lied to an officer about his name, address, date of birth, about whether he had any identification, and about where he had been on two occasions that evening; that in November 1999, he lied in telling an officer that he had fallen asleep in a business

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[1] A cursory review of the cross-examination of both the complainant and the patrolman, appended at A13-136, cannot fail to shed light on Moeck's decision that he need not testify, and on the State's decision to accept the trial court's offer of a mistrial.

establishment while the business was open to the public, about whether or not he could move his hands and legs, about whether he was too drunk to walk, and about whether he needed an ambulance to transport him to the hospital; and that he lied to a potential roommate with regard to his prior criminal record (A83-86).

At Moeck's third trial, Sader had given sworn testimony at a preliminary hearing and two prior trials, in addition to his oral and written statements to police. During cross-examination, Sader acknowledged inconsistencies with regard to at least 15 aspects of his testimony about the incident, including whether he was walking or riding his bike when he met Moeck (A18), whether he met Moeck north or south of Tom's Turkey bar (A19), whether he approached Moeck before or after Moeck spoke to him (A24), whether he went to Moeck's apartment to drink beer with Moeck or to party and play pool with a bunch of other people (A32); which couch he sat on after he arrived at Moeck's apartment (A38-39); whether he rather than Moeck turned the TV on at the apartment (A41-42); whether he was laying on his back or his side while he looked at "nude" magazines (A48); whether Moeck's jeans were down to his ankles or completely off during the alleged assaults (A47); whether he looked at only one or at a handful of "nude" magazines during the alleged assault (A51-53); whether he was standing up or laying down during the first alleged sexual assault (A54); whether the robbery occurred while he was on the mattress (in between instances of alleged sexual contact) or at the very end of the alleged incident while he was standing up against a wall (A55-59); whether he was struck by Moeck once every time he looked at Moeck, for a total of about six times, or two or three times every time he

refused Moeck's advances (A65-68); whether he was forced to take one, two, or three puffs of marijuana during the robbery (A68-70); whether he left Moeck's apartment when it was just starting to get light out, or at 7:30 a.m., an hour and half after sunrise (A71); and whether he left Moeck's apartment immediately after getting off the mattress or after standing up against the wall for a half hour (A72-73).

Three of these inconsistencies involved major features of the alleged incidents of sexual assault, robbery, and bat[illegible]y. First, with regard to the sexual assault allegation, Sader testified that he was never standing when fellatio was performed on him (A54). Sader told Officer Abraham, however, that the first instance of fellatio occurred while he was standing naked in front of Moeck, when Moeck positioned himself in front of Sader with the knife at his stomach and did "what girls usually do to guys when the girls on her knees" (A7). Sader told Abraham that, after this, Moeck ordered him onto the mattress and that Moeck then got down on the mattress and started to perform fellatio *again* (A8). Second, with regard to the robbery allegation, Sader testified that he was robbed near the end of the alleged 4 ½ hour ordeal; that Moeck ordered him to get off the mattress and stand against a chest facing the wall for about a half hour; that while thus standing, he could hear Moeck rummaging through his shorts and wallet; and that after the robbery Moeck told him to get dressed (A54-56). At the preliminary hearing, however, Sader testified that he was on the mattress when he was robbed; that after the first instance of fellatio, Moeck ordered him to turn on his side, and that he could hear Moeck going through his wallet and shorts; and that after this, Moeck again performed fellatio (A57-59).

Sader acknowledged that his preliminary hearing testimony was "not the way it happened" (A57). Third, with regard to the battery allegation, Sader testified at the third trial that he was slapped "close to half a dozen times," and that he was struck *once* every time he looked at Moeck (A65). Sader acknowledged that, at the preliminary hearing, he had testified incorrectly that "every time I kept on refusing to him, he hit me like two or three times with the back of his hand" (A65). Sader also acknowledged that his testimony at the first trial, that Moeck didn't hit him every time he looked at Moeck, was incorrect (A67).

Testimony of Officer Abraham

Moeck's decision to not testify at the third trial was made immediately after a withering cross-examination of the "investigating" officer, Robert Abraham (A88-136). Abraham was a third year patrolman who candidly acknowledged he was not an investigator and who could only recall being involved in two prior sexual assault cases (A91-92). Abraham testified that he contacted an investigator on the day Sader reported the offense, but it was a weekend and an investigator was not on duty (A93). He acknowledged that apart from his search of Moeck's apartment on the day of the offense, the only follow up investigation conducted was his interview with Moeck's landlord in January 1998, six months after the offense (A127).

Abraham testified that he requested a search warrant for Moeck's apartment, based on Sader's verbal report of the incident, specifically requesting to search for

drugs and drug paraphernalia, $10 bills, a hacksaw, and a 12-inch knife, and that he found none of these items in the apartment (A115). He testified that he noticed no marks or injuries on Sader, though Sader claimed he was "backhanded" by Moeck on the face six or seven times (A113, 120). Abraham testified that he found no physical evidence whatsoever in Moeck's apartment that would link Moeck to a specific crime (A116). Abraham testified that he never questioned Sader about the inconsistencies between his verbal statement and written statement (A129).

Abraham testified that he never examined or even looked at Sader's genitals even though Sader claimed to have been subjected to four hours of masturbation and fellatio (A128-130). Abraham dropped Sader off at the hospital with a social worker (A114), but did not require anyone at the hospital to conduct a sexual assault examination "because I didn't feel at the time there was really any evidence to collect on his body" (A130). He testified that even though Sader had come to the police station directly from the alleged assault, without showering or changing clothes, he never thought to check for saliva evidence on Sader, and did not collect Sader's underwear. (A131).

Abraham testified that, even though Sader claimed that Moeck had looked through his billfold and at his driver's license, he did not attempt to take any fingerprints from those items (A132). He did not run any drug screen on Sader, though Sader claimed Moeck had forced him to smoke marijuana (A132). He did not search the public bathroom across the hall from Moeck's apartment, other than "just

looking into it" (A133). He did not search Moeck's vehicle for any physical evidence because "I didn't' know he had a vehicle" (A134-35). He didn't search for evidence in the dumpsters behind Moeck's apartment (A117). He didn't speak with any of Moeck's neighbors in the apartment building; didn't speak with any patrolmen who might have been on Third Street that night, where Sader claimed to encountered Moeck; and didn't speak to anyone at Sneaker's Tavern, where Sader claimed to have been prior to the assault (A133-34).

On a scale of one to ten, Abraham rated his investigation of this case a ten (R233:276, A125).

Moeck's Decision to Not Testify

At the close of the State's case in the third trial, Moeck's counsel conferred with Moeck and then announced that the defense would not be presenting evidence (R233:297). The court then questioned Moeck about his decision to not testify, to ensure his waiver of the right to testify was knowing and voluntary (R233:298). The court failed to inform Moeck that, as a result of his decision to not testify, the court would – in only a few short minutes – be granting a mistrial.

At the postconviction hearing, Moeck testified that, prior to the third trial he discussed with his attorney whether or not he would testify, and had decided "that I would testify in the third trial just as I had in the first two trials" (R248:156). Unlike Sader, Moeck had no reason to be concerned that cross-examination would reveal

inconsistencies in his testimony because his prior testimony was consistent. At his first trial, Moeck testified that he had met Sader at a bar about a month prior to this alleged incident and told Sader where he lived and that he might want to buy some marijuana once in a while; that on the night of the alleged incident Sader came to his apartment at about 3:00 a.m. and woke him by knocking on the door; that Sader said he had some marijuana to sell; that Sader seemed intoxicated and told Moeck that he couldn't go home because his father was home and asked if he could stay at Moeck's apartment until morning; that Moeck agreed to this and allowed Sader to stay and told him they would discuss the marijuana in the morning; that in the morning, Moeck woke up Sader and they discussed the sale of an ounce of marijuana for $120; that upon Sader's request, Moeck showed Sader that he had that much money and put a $100 bill and a $20 bill on the table but told Sader that he only wanted about $20 or $30 worth; that Sader said he didn't want to break up the ounce so Moeck told him to keep it; that Moeck went to use the bathroom and, upon returning, noticed that his $120 was missing; that Moeck told Sader to give the money back and Sader denied taking it; that Moeck pushed Sader up against a sink and threatened to hit him at which time Sader returned the money to Moeck, which he had hidden in his shoe; and that Moeck then pushed Sader out of his apartment (R88:180-206). At his second trial, Moeck testified entirely consistently with his testimony from the first trial (R93:210-237).

Moeck stated that he made the decision to not testify as soon as the State rested:

> [W]e won that trial. There was no way that jury was going to convict me of anything, because the alleged victim in this case told so many lies, got caught up in so many lies.
>
> They found there was no investigation done in this matter, and there was no doubt in anybody's mind that we won that case.
>
> R248:156-157.

At the postconviction hearing, Moeck's trial counsel explained the decision to not testify in similar fashion:

> The evidence in the cross examination of the State witnesses went extremely well in that case. And during the course of the trial, there were many, many inconsistencies within Mr. Sader's testimony. The case went very well. At the end of the State's case, the decision was basically made at that point that Rich would not take the stand. That there was no need for him to take the stand.
>
> R248:15.

The Jury Instruction Conference and Mistrial Decision

The prosecutor came to the jury instruction conference with a proposed curative instruction to address defense counsel's opening statement which summarized anticipated testimony by Moeck that was not produced when Moeck decided to not testify (*Pet. App.* at A85-86). The court proposed the following instruction:

> The jury is not to consider any statement of certain facts made in opening statements when such facts were not supported by evidence received during the course of this trial.
>
> (*Pet. App.* at A87-88).

After fashioning the curative instruction, the court and parties also discussed what the proper scope of the prosecutor's closing argument should be, and agreed that the prosecutor could argue that the defendant presented no evidence to back up the assertions in the opening statement, as long as she didn't say that the defendant didn't take the stand and testify to those facts (*Pet. App.* at A88-90). The court then asked the State, "Do you want to go ahead or not?" (*Pet. App.* at A90), indicating that, had the State elected to proceed with the trial, using the proposed curative instruction, the court would have proceeded with the trial. After the State indicated, "I think I'm gonna ask for a mistrial, Judge," and after further comment by defense counsel, the court again indicated that the decision about whether the trial would proceed or not rested entirely in the State's hands. The court asked: "Is that your final answer, Ms. Matousek?" (*Pet. App.*, at A91). When the State responded "yes," the court declared a mistrial.

After the mistrial was declared, Moeck's counsel spoke outside the courthouse with Sergeant Abraham, the investigating officer for the offense and the officer who assisted the prosecutor in the presentation of the State's case, and who indicated that he had done a much better job than Moeck's previous attorney and that that was why the state had requested a mistrial (A6).

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REASONS FOR DENYING THE WRIT

I. The Wisconsin Supreme Court Decision Is Entirely Consistent with This Court's Decision in *Arizona v. Washington.*

A. The *Arizona v. Washington* Review Standard.

This Court should deny review because the Wisconsin Supreme Court decision is entirely consistent with the decision of this Court in *Arizona v. Washington*, 434 U.S. 497 (1978). In *Washington*, this Court set forth a framework for appellate review of a trial court's determination of "manifest necessity" for a mistrial. Under that framework, a reviewing court must first determine the level of deference to be accorded the mistrial decision, based on the circumstances giving rise to the mistrial issue. Second, to ensure the defendant's constitutionally protected right against double jeopardy, a reviewing court must ensure that the trial judge exercised "sound discretion" in granting a mistrial. The Wisconsin Supreme Court carefully adhered to this framework in its review of Moeck's case.

In *Washington*, the defense opening argument informed the jury that, in the previous trial of that case, the prosecutor had hidden, suppressed, and purposefully withheld evidence from the defendant, and that as a result of this misconduct, the Supreme Court of Arizona granted a new trial. *Washington*, 434 U.S. at 499. The prosecutor moved for a mistrial, arguing that any evidence of misconduct by the State in the previous trial was inadmissible. Defense counsel was unable to offer any authority to support the admissibility of the evidence he had referred to in the opening statement. The trial judge ordered a mistrial because the defense lawyer's

opening statement was improper, referring to inadmissible evidence. On federal habeas review, the federal district court concluded that, even though the opening statement was improper, the writ must be granted because the trial court failed to make a finding of "manifest necessity" for a mistrial. The Ninth Circuit affirmed, agreeing that the defense opening statement was improper and that the trial court had failed to find "manifest necessity" or to consider alternatives to a mistrial.

In setting forth the proper framework for appellate review of a mistrial decision in *Washington*, this Court first recognized a spectrum of circumstances giving rise to mistrials. At one end of the spectrum, the Court approved the strictest scrutiny "when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508. At the other end of the spectrum, the Court recognized the need for great deference to a trial judge's determination that a jury is deadlocked. *Id.* at 509-10. The *Washington* Court concluded that, "along the spectrum of trial problems which may warrant a mistrial," a mistrial based on an improper defense opening statement is entitled to "special respect." *Id.* at 510.

The *Washington* Court further recognized that, even in cases requiring "special respect" for the trial court's mistrial decision, a second step of appellate review is necessary to ensure that the defendant's constitutional right against double jeopardy has been adequately protected. The reviewing court must ensure that the trial court

exercised "sound discretion" in granting the mistrial. *Id.* at 514. The Court elaborated that "sound discretion" includes whether the trial judge acted irrationally or irresponsibly, whether the trial judge acted precipitately in response to the prosecutor's request for a mistrial, and whether both counsels were provided full opportunity to explain their positions on the propriety of a mistrial. *Id.* at 515-516.

B. The Wisconsin Supreme Court Carefully Adhered To The *Washington* Review Standard.

In Moeck's case, the Wisconsin Supreme Court carefully and explicitly followed the review standard set forth in *Washington*. The Wisconsin Supreme Court noted that, to determine whether the trial court erred in granting a mistrial, it must examine in turn:

> (A) the constitutional protection against double jeopardy and the manifest necessity standard used to determine whether a mistrial should be ordered; (B) the level of deference to be applied to a circuit court's mistrial order; (C) the circumstances leading up to the granting of the mistrial; and (D) our application of the constitutional principles and standard of review to the circumstances of the case.
>
> *(Pet. App., A9, par. 32)*

The Wisconsin Supreme Court first discussed the double jeopardy protections and set forth the "manifest necessity" standard, citing to *Washington* and other decisions of this Court. The Wisconsin Court then addressed the proper level of deference to be accorded to the trial court in Moeck's case, as required by *Washington*. The Wisconsin Court specifically noted the "spectrum of deference" set forth in *Washington*, and

concluded, consistent with the State's position, that the trial court's decision must be accorded the "special respect" that was applied in *Washington* to the mistrial based on defense counsel's opening statement:

> In cases like the present one, in which a mistrial was ordered on the basis of defense counsel's opening statement, a circuit court's determination "is entitled to special respect."
>
> *(Pet. App., A13, par. 41*, quoting *Washington*, 434 U.S. at 510*)*

After determining the level of deference to accord the trial court's decision, the Wisconsin Court noted, again following and quoting *Washington*, that a reviewing court must also satisfy itself that "sound discretion" was exercised. The Wisconsin Court defined "sound discretion" consistently with *Washington*, noting that it requires acting in a "rational and responsible manner," acting in a deliberate manner, taking time in responding, giving both parties full opportunities to explain their positions and considering alternatives, and noting that "sound discretion" is not exercised when the circuit court fails to consider the facts of record under the relevant law, bases its conclusion on an error of law, or does not reason its way to a rational conclusion. *(Pet. App., A13-14, par. 43).*

Applying this *Washington* review framework to Moeck's case, the Wisconsin Supreme Court concluded that, regardless of the level of deference to be applied, the trial court failed to exercise the "sound discretion" required by *Washington*. The Wisconsin Court noted that the State has never contended that Moeck's counsel was engaged in gamesmanship, sandbagging, or acting in "bad faith" when he gave his opening statement, and that the State has not contended that Moeck's counsel had

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any reason to believe that his opening statement would not be supported by admissible evidence (*Pet. App., A20-21, par. 62, 65).*[2] The Wisconsin Supreme Court concluded that the trial court did not exercise sound discretion in granting a mistrial. Citing both this Court's decision in *United States v. Robinson*, 485 U.S. 25, 31-34 (1988) and decisions of the Wisconsin appellate courts in *State v. Keith*, 216 Wis. 2d 61, 80-83 (573 N.W.2d 888 (Ct. App. 1997), *State v. Johnson*, 121 Wis. 2d 237, 247-49, 358 N.W.2d 824 (Ct. App. 1984), and *State v. Edwardson*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988), the Wisconsin Court determined that the trial court erred as a matter of law in concluding that the prosecutor would be unable to effectively countermand the defense opening statement (*Pet. App.*, A23-26, par. 71-77). The Wisconsin Court noted that these decisions uniformly recognize that an accused may "open the door" to a measured response by the prosecutor commenting on the failure of the defense to produce the evidence promised in the opening statement. The Wisconsin Court concluded that, given the latitude allowed under these decisions for the prosecutor to comment on the defense failure to produce anticipated evidence, and given the availability of a curative jury instruction admonishing the jurors that opening arguments are not evidence, the circuit court erred as a matter of law in finding "manifest necessity" for a mistrial (*Petitoner's Appendix, A27, par. 79).*

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[2] Because the case did not raise the issue of a defense lawyer giving an opening statement in "bad faith," the Wisconsin Supreme Court did not address that issue.

The Wisconsin Supreme Court correctly concluded that the trial court erred as a matter of law regarding the prosecutor's ability to countermand the defense opening statement. Had the trial court given the attorneys an opportunity for research and deliberation, it may well have discovered those cases, noted above, indicating that a measured response is permissible. The trial court acknowledged that it had read only two mistrial cases, one involving defense witnesses who committed perjury, and one involving prosecutorial misconduct (A89-90), and on this paltry basis stated, "It's clear, I think, that the Court can grant a mistrial." (A90). The trial court candidly acknowledged that "[t]hat's the best I can do off the top of my head" (A89). Unlike in *Washington*, the trial court provided no opportunity for the attorneys to conduct research and provide guidance to the court on this critical ruling. The Wisconsin Supreme Court correctly concluded that such decision-making does not meet *Washington's* "sound discretion" standard.

The petition is curiously silent with regard to the Wisconsin Court's determination that the trial court failed to exercise "sound discretion" because it erred as a matter of law in concluding that the prosecution could not effectively countermand the defense opening statement. The petition fails to even acknowledge, much less address, the Wisconsin Court's application of the "sound discretion" standard required by *Washington*. Perhaps the State fails to address the Wisconsin Court's application of *Washington's* "sound discretion" standard because, to do so would require the petitioner to acknowledge that the Wisconsin Court *was* closely adhering to the review standards set forth in *Washington*. The petitioner has not

argued that the Wisconsin Supreme Court's determination that the trial court erred as a matter of law on this point was erroneous. Further review by this Court, therefore, is not warranted.

C. The Wisconsin Supreme Court Did Not Conduct a "*De Novo*" Review Of The Trial Court's Mistrial Decision.

The petitioner argues to this Court that the Wisconsin Supreme Court disregarded *Washington* and reviewed the mistrial decision *de novo* (*Petition* at 11-12). In support of this, the petitioner quotes a partial paragraph from the Wisconsin Supreme Court decision, in which the court indicates:

> We must determine whether "the circuit court erred [in the third trial] when it determined that the State met its burden of showing the requisite manifest necessity to support the mistrial order that terminated" the defendant's third trial.
>
> (A9, par. 32).

Nothing in that statement indicates that a *de novo* standard of review will be applied, and the remainer of the paragraph, omitted by the petitioner, reveals that the Wisconsin Court will be following the *Washington* review standard, including a determination of the level of deference to be applied to the trial court's mistrial decision. *Id.* As noted above, the Wisconsin Supreme Court went on to determine, consistent with *Washington*, that the mistrial decision in Moeck's case was entitled to "special respect," similar to the mistrial decision in *Washington*, because both involved

defense opening statements.[3] Nothing in the opinion suggests that the Wisconsin Court was applying a *de novo* standard of review. The petitioner simply disagrees with the Wisconsin Court's conclusion that, even allowing for the "special respect" to the trial court's decision, as required by *Washington*, the trial court did not exercise "sound discretion" as also required by *Washington*.

The petitioner further argues that the Wisconsin Supreme Court "emphasized the high burden that is on the State to justify a mistrial" rather than reviewing the record with deference to the trial judge (*Petition* at 12). The State posits a false dichotomy: a reviewing court, under *Washington*, must recognize that the State bears a high burden of showing "manifest necessity" and must also determine how much deference or scrutiny to give to the trial court's decision. *Washington* recognizes both the high burden on the State, and the need for "special respect" for the trial court's decision in some cases. *Washington* indicates that the burden on the prosecutor to show manifest necessity is "a heavy one" 434 U.S. at 506. The Wisconsin Supreme Court accurately followed *Washington*, recognizing both the heavy burden on the prosecutor to show manifest necessity, and the need for "special respect" for the trial court's decision.

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[3] As noted in part D, the defense opening statement in Moeck, unlike that in *Washington*, was not improper in content, and thus was not even entitled to the "special respect" accorded to it by the Wisconsin Supreme Court.

Because the Wisconsin Court did not review the mistrial decision *de novo*, and because the Wisconsin Court followed *Washington* in giving "special respect" to the trial court's mistrial decision, further review by this Court is not warranted.

D. Under *Arizona v. Washington*, The Trial Court's Mistrial Decision Was Erroneous For Additional Reasons Not Addressed By The Wisconsin Supreme Court.

Because the Wisconsin Supreme Court concluded, pursuant to *Washington*, that the trial court failed to exercise the "sound discretion" because it erred as a matter of law regarding the ability of the prosecutor to address the defense opening statement, the court did not have to address or resolve a number of additional factors indicating that the trial court's mistrial decision was a departure from the standards set forth in *Arizona v. Washington*, including that the trial court erred as a matter of law in concluding that the defense opening statement was in "bad faith" and improper, that the trial court failed to exercise discretion when it delegated the mistrial decision to the prosecutor, and that the trial court acted precipitously in granting the mistrial, failing to provide any opportunity for research and deliberation.

1. The Trial Court's Mistrial Decision Was Not An Exercise of "Sound Discretion" Because The Defense Opening Statement Was Not Improper.

This Court has long established that an opening statement summarizing, in good faith, the anticipated admissible testimony of a witness is proper even though

the witness ultimately decides to not testify. *Frazier v. Cupp*, 394 U.S. 731 (1969). There are many legitimate reasons why testimony summarized in an opening statement might not ultimately be presented at trial: a witness may not show up, the witness may testify differently from what the lawyer expected, the lawyer may neglect to call the witness, the lawyer may determine in the course of the trial that, for a variety of reasons, the witness need not be called, or, as in *Frazier* and Moeck's case, the witness may claim a privilege that precludes his testimony. No lawyer can determine, with certainty, at the time of giving an opening statement, what the testimony will actually be. A lawyer can only summarize what he or she reasonably *anticipates* the admissible testimony to be.

The State has never asserted that the opening statement in this case was not in "good faith." The petition acknowledges that Moeck's defense counsel assumed that Moeck would testify (*Petition* at 3), and that the opening statement was a summary of this anticipated testimony (*Petition* at 4). The Wisconsin Supreme Court recognized that the case does present the question of a "bad faith" opening statement, and did not address that issue. The State continues to assert, however, without providing a single supporting authority from any State or federal jurisdiction, that the defense opening was improper, and has framed the question presented as involving, like *Arizona v. Washington*, an improper defense opening statement. Because the defense opening statement was entirely proper, the trial court failed to exercise the "sound discretion" required by *Washington* when it concluded that a lawyer who summarizes,

in opening argument, the anticipated testimony of a defendant must be absolutely certain that the defendant will testify.

(a) Under *Frazier v. Cupp*, 394 U.S. 731 (1969), An Opening Statement That Summarizes Anticipated, Admissible Testimony But Fails To Produce That Testimony Is Not Improper.

In *Frazier v. Cupp*, 394 U.S. 731 (1969), the United States Supreme Court addressed the meaning of a "good faith" opening statement, when an attorney refers to testimony that is ultimately not produced at trial. In *Frazier*, prior to trial, defense counsel warned the prosecutor not to refer, in his opening statement, to the expected testimony of Rawls, a codefendant, because Rawls would invoke his privilege against self-incrimination if called to testify. The prosecutor then spoke with a probation officer and police officer, who both indicated that Rawls would testify. In his opening statement, the prosecutor included a summary of Rawls' testimony. The summary "took only a few minutes to recite." *Frazier* at 733. The defense moved for a mistrial at the close of the opening statement and this was denied. Rawls later invoked his privilege and did not testify, and the mistrial motion was renewed and again denied. A curative instruction was given, informing the jury that the remarks of counsel are not evidence. *Frazier* at 734.

Frazier argued on appeal that the prosecutor's summary of Rawl's testimony could have been viewed by the jury as testimony and that he was denied his right of confrontation and cross-examination. The Court upheld the conviction, concluding

that the prosecutor's opening statement was an objective summary of evidence that he reasonably expected to produce, and that it is reasonable to assume that the jury will limit its consideration to the evidence produced, when a proper limiting instruction has been given.

The *Frazier* court's conclusion that it is entirely permissible for an attorney to refer, in an opening statement, to testimony that he reasonably expects to produce, even though that evidence may ultimately not be produced, is consistent with standards of professional conduct governing counsel's conduct in giving an opening statement. The American Bar Association Standards for Criminal Justice, Standard 4-7.4, The Defense Function, Opening Statement, provides that the opening statement should be limited to "a brief outline of the issues and the matters counsel believes can be supported with competent and admissible evidence." The commentary to this Standard provides that "if, through honest inadvertence, counsel's proof falls significantly short of the opening statement, the court should be asked to give a clarifying instruction." Similarly, the American Bar Association Code of Professional Responsibility, DR7-106(C)1 provides that a lawyer shall not "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." These standards do not in any way preclude a lawyer from referring in the opening statement to admissible evidence that the lawyer reasonably expects to produce.

nce that

(b) The Trial Court Failed to Exercise "Sound Discretion" Because The Mistrial Decision Was Based On The Erroneous View That the Defense Opening Statement Was Improper.

The trial court based the mistrial decision on an error of law when it concluded that any opening statement that summarizes anticipated testimony but then fails to produce that testimony is an improper, "bad faith" opening statement. At the jury instruction conference, the prosecutor suggested that it was unethical for defense counsel to summarize anticipated testimony by the defendant and then not produce it (*Pet. App., A86).* In response, defense counsel noted that opening statements are not evidence, that he is permitted to tell the jury what he believes his client will testify to, and that the final decision about whether the client will testify is not made until after the State has presented its case (*Pet. App., A86).* Without providing any opportunity for the attorneys to research or address further the meaning of a "good faith" opening argument, the trial court concluded "I don't think your statement of the law is correct. You can't tell the jury what the evidence is gonna show and then don't show it." (*Pet. App., A87).* The court stated that if a defense lawyer doesn't know for sure whether his client is going to testify, he can not give the defendant's version of the events in the opening statement (*Pet. App., A87*). The trial court's written decision denying Moeck's motion to dismiss on double jeopardy grounds again reiterated this erroneous view of "good faith":

> If Mr. Gaskell was unsure as to whether or not Mr. Moeck would testify when he presented his opening statement, he should not have brought out Mr. Moeck's version of the incident in his opening statement.
>
> *Pet. App., A95..*

On appeal, the State has never advanced the trial court's erroneous view of a "bad faith" opening argument. The Wisconsin Supreme Court noted that "the State does not contend that defense counsel was engaging in gamesmanship or sandbagging or acting in bad faith when defense counsel made opening statements at the defendant's third trial" (*Pet. App., A20).* The Court noted:

> The State does not contend that defense counsel's opening statement was in bad faith, that is, the State does not contend that defense counsel had a reasonable basis to believe that his opening statement would not be supported by admissible evidence. The defendant's position in the present case is that defense counsel's opening statement was offered with the reasonable expectation that the defendant would testify and that the opening statement conformed to the defendant's testimony in the prior trials. Defense counsel asserted that he expected the defendant to testify (as the defendant had in prior trials), but he did not know in fact whether the defendant would testify.
>
> Because this case does not raise the issue of an attorney's making an opening statement in bad faith, we do not address that circumstance.
>
> (*Pet. App., A21, par. 65).*

The trial court's mistaken view of a "good faith" opening argument was the basis for the grant of the mistrial. Under *Washington*, the trial court failed to exercise "sound discretion" because, pursuant to *Frazier v. Cupp*, the court erred as a matter of

law in concluding that the defense opening statement was in "bad faith" and improper.

2. The Trial Court's Mistrial Decision Is Not Entitled "Special Respect" Under *Washington* Because The Defense Opening Statement Was Not Improper

The Wisconsin Supreme Court accorded "special respect" to the trial court's mistrial decision because Moeck's case, like *Washington*, involves a defense opening statement (*Pet. App., A13, par. 41*). Unlike in *Washington*, however, where the defense opening referred to *inadmissible* evidence that attacked the integrity of the prosecution, the defense opening in Moeck was entirely proper. A reviewing court, therefore, could apply a stringent standard of appellate review, consistent with the spectrum of review levels set forth in *Washington*, particularly because there exists "reason to believe" that the prosecution sought the mistrial in Moeck's case in order to take advantage of its failure of proof.

In *Arizona v. Washington*, the Court "start[ed] from the premise that defense counsel's statement was improper . . .." *Id.* at 511. The *Washington* Court's analysis of the issue is fundamentally grounded on the *inadmissibility* of the evidence referred to, and the resulting *impropriety* of the opening statement. The Court adopted a strict standard of appellate review of mistrials based on defense misconduct to avoid impeding the trial court's duty to preserve the integrity of the trial process when such order is threatened by professional misconduct:

precisely

> Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct."
>
> *Washington*, 434 U.S. at 512-513 (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976).

Unlike in *Washington*, Moeck's case does not involve defense misconduct or a "bad faith" opening argument. As noted in part II, below, throughout all the litigation of this matter in the Wisconsin courts and now before this court, the State has failed to provide a *single* authority, either in State or federal case law, recognized practice standards, or academic literature, suggesting that it is improper for an attorney to summarize the anticipated, admissible testimony of a witness in an opening statement. *Washington* approved a narrow or strict standard of appellate review for mistrial decisions based on attorney misconduct, to avoid impeding the trial court in responding to such misconduct. In a case that does not involve defense misconduct, such a strict appellate review standard is unnecessary.

Petitioner notes, correctly, that when defense counsel summarizes the anticipated, admissible testimony of the defendant in opening statement, but then fails to produce that testimony, the defense can be devastated, resulting in "compelling ineffective assistance of counsel challenges" on appeal (*Pet. at 26*). It is

precisely this possibility for bias against the defense that sets Moeck apart from a situation like that in *Washington*, involving improper defense conduct. Where improper defense conduct is involved, only the State faces possible bias as a result of that conduct. In *Washington*, for example, the State faced bias as a result of an argument referring to inadmissible evidence that the State had suppressed and hidden evidence in earlier proceedings in the case. The improper argument was a direct attack on the integrity of the State, threatening the fairness of the proceedings. In contrast, the situation that developed when Moeck decided to not testify produced the possibility of bias both against the State and, even more so, against the defense. Substantial authority recognizes the tactical disadvantage to the defense if promised evidence is not produced. Perrin, "*From O.J. to McVeigh: The Use of Argument in the Opening Statement*," 48 Emory L.J. 107, 132 (1999); Gianna and Julien, *Opening Statements 2d – Winning in the Beginning by Winning the Beginning*, sec. 8.3, at p. 8-5 (West 2004). The Wisconsin court of appeals also noted this, stating that an attorney's failure to produce promised evidence is not lost on the jury and can be devastating (*Pet. App, A71, par. 15*). While Moeck's decision to not testify may have hurt his case, given the evidence promised by counsel in his opening statement, both Moeck and his counsel were willing to take this risk because they were sure the State had lost its case. The State offers no explanation as to why defense counsel's violation of a general principle of effective advocacy amounts to an unethical or improper tactic that should provide grounds for the opposing party, who benefits from the poor advocacy, to obtain a mistrial.

3. The Trial Court's Mistrial Decision Is Not Entitled "Special Respect" Under *Washington* Because There Is "Reason To Believe" That the Prosecutor Sought The Mistrial To Achieve A Tactical Advantage Over Moeck.

In *Washington*, the Court determined that the "strictest scrutiny" is appropriate when "there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 U.S. at 508. The Double Jeopardy Clause was designed to protect the individual from just such a circumstance, to prevent a retrial to allow the State to bolster a weak case:

> This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade v. Hunter*,336 U.S. 684; *Kepner v. United States*, 195 U.S. 100, 128. In general see American Law Institute, Administration of The Criminal Law: Double Jeopardy 61-72 (1935). This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.
>
> *Green v. United States*, 355 U.S. 184, 188 (1957).

This concern with preventing a prosecutor whose believes he or she has failed to prove his case from manipulating the trial to obtain a "second kick at the cat" is precisely the situation presented in Moeck's case. In Moeck's case, there exists substantial "reason to believe" that the prosecution decided to accept the mistrial option offered by the court in an effort to salvage a failed prosecution.

"I Believe"

First, the State's case hinged entirely on the credibility of the complainant, Sader, and the presentation of Sader's testimony had been a disaster, due to the number and nature of the inconsistencies between his trial testimony and his previous sworn testimony and statements. These were not "minor details" that one might normally expect from multiple opportunities to testify, but included major features of the alleged offense, including how and where Sader met Moeck, why Sader went to Moeck's apartment, whether the first alleged instance of sexual contact occurred while Moeck was standing up or was on a mattress, whether Moeck had his pants on or off during the alleged assaults, how many times and where Sader was allegedly slapped by Moeck, and whether the alleged robbery occurred in-between instances of alleged assault (while Sader was laying on a mattress) or at the very end of the encounter (while Sader was standing up facing a wall). All of these inconsistencies were effectively presented to the jury by defense counsel's cross-examination.

Second, defense counsel had effectively portrayed the appalling lack of investigation by Officer Abraham, including the failure to physically examine Sader, failure to collect his underwear, failure to collect biological evidence for possible DNA evidence, failure to follow up on inconsistencies in Sader's verbal and written statements, failure to search for physical evidence described by Sader, and failure to interview neighbors or bar patrons who might corroborate Sader's story.

Third, after the mistrial was declared, Moeck's counsel spoke outside the courthouse with Abraham, the investigating officer who assisted the prosecutor in the

presentation of the State's case, who was present with the assistant State's attorney when the mistrial decision was discussed with the elected district attorney (R242:4), and who indicated that he had done a much better job that Moeck's previous attorney and that that was why the state had requested a mistrial (A6).

Fourth, both Moeck and his counsel explained that the reason Moeck did not testify was because both he and Moeck believed that the State had failed to prove its case, and that Moeck's testimony was unnecessary. At the postconviction hearing, Moeck testified that, prior to the third trial he discussed with his attorney whether or not he would testify, and had decided "that I would testify in the third trial just as I had in the first two trials" (R248:156). Moeck stated that he made the decision to not testify as soon as the State rested:

> [W]e won that trial. There was no way that jury was going to convict me of anything, because the alleged victim in this case told so many lies, got caught up in so many lies.
>
> They found there was no investigation done in this matter, and there was no doubt in anybody's mind that we won that case. R248:156-157.

Similarly, Moeck's trial counsel explained the decision to not testify in similar fashion:

> The evidence in the cross examination of the State witnesses went extremely well in that case. And during the course of the trial, there were many, many inconsistencies within Mr. Sader's testimony. The case went very well. At the end of the State's case, the decision was basically made at that point that Rich would not take the stand. That there was no need for him to take the stand. R248:15.

Finally, the State acknowledged, at oral argument before the Wisconsin Supreme Court, that significant credibility attacks on Sader had been made at trial, stating, "Counsel repeatedly refers to the fact that oh, the state wanted a mistrial because its case was going badly. You bet its case was going badly."[4]

For all of these reasons, there exists significant "reason to believe" that the prosecution sought a mistrial to obtain a better opportunity to obtain a conviction after presenting a weak case at trial. Under such circumstances, consistent with *Arizona v. Washington*, the Wisconsin Supreme Court was not required to give "special respect" to the trial court's mistrial decision. The Wisconsin Court could have applied a much stricter standard of review than it did, and could have concluded that a mistrial was inappropriate because it would allow the State to do precisely what the Double Jeopardy Clause was designed to prevent.

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[4] The oral argument can be heard at: (http://www.courts.state.wi.us/supreme/scoa.jsp?docket_number=&begin_date=&end_date=&party_name=Moeck&sortBy=date). Counsel's comments are at 24:50-24:59 on the recording.

4. The Trial Court Delegated The Mistrial Decision To The Prosecutor.

The Wisconsin Court of Appeals concluded that the trial court committed an error of law by abdicating its discretion to the State, allowing the State to choose between a mistrial or proceeding to a verdict with a curative instruction (*Pet. App., A69, par. 13).* The Wisconsin Supreme Court noted that it did not need to determine whether the trial court delegated the mistrial decision to the State, in light of its conclusion that the trial court failed to exercise sound discretion in the areas noted above (*Pet. App., A23, par. 70).* The record of the trial court's mistrial decision, however, clearly shows that the court allowed the State to choose whether to proceed with the trial or obtain a mistrial. Notably, the State's summary of facts avoids any reference to this part of the record of the mistrial decision.

The prosecutor came to the jury instruction conference with a proposed curative instruction to address defense counsel's opening statement which summarized anticipated testimony by Moeck that was not produced when Moeck decided to not testify. It was the court, not the prosecutor, who suggested the mistrial option (A87). After discussion of and formulation of a curative instruction that was agreed to by all parties, the court offered the mistrial option to the State:

> THE COURT: *Do you want to go ahead or not?* I mean, I told her, it's on the record, I'm not gonna take it back, I think under – the State under the circumstances now would be entitled to a mistrial *if they wanted one.*
>
> (*Pet. App., A90).*

After the State indicated, "I think I'm gonna ask for a mistrial, Judge," and after further comment by defense counsel, the court again indicated that the decision about whether the trial would proceed or not rested entirely in the State's hands. The court asked: "Is that your final answer, Ms. Matousek?" (*Pet. App.*, A91). When the State responded "yes," the court declared a mistrial.

As the Wisconsin court of appeals recognized, there can be no finding of "manifest necessity" when the State is offered a choice between either mistrial or proceeding with trial and a cautionary instruction. The trial court's abdication of the mistrial decision to the State can only be viewed as a failure to exercise the "sound discretion" required by *Washington*.

5. The Trial Court Did Not Act Deliberately.

Under *Washington*, if a trial judge acts "irrationally or irresponsibly" in granting a mistrial, the mistrial is not an exercise of "sound discretion" and must be set aside. The Court explained why the trial judge in that case had not acted properly:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial.
>
> *Washington*, 434 U.S. at 515.

Unlike *Washington,* the trial court in Moeck failed to allow a full opportunity for research and deliberation on the mistrial issue. The question arose at 6:00 p.m., after a full day of trial. At that point, the court could easily have dismissed the jury for the night, allowing the parties to conduct some research. Without this opportunity, the court ordered a mistrial, apparently without even an awareness of the relevant legal standard, "manifest necessity." The court had no understanding of law relating to "good faith" opening statements, including *Frazier v. Cupp*, *supra*, to guide the court's assessment of whether the defense opening statement was improper. The court had no awareness of *United States v. Robinson*, 485 U.S. 25, 31-34 (1988) and decisions of the Wisconsin appellate courts in *State v. Keith*, 216 Wis. 2d 61, 80-83 (573 N.W.2d 888 (Ct. App. 1997), *State v. Johnson*, 121 Wis. 2d 237, 247-49, 358 N.W.2d 824 (Ct. App. 1984), and *State v. Edwardson*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988), which provide direction for allowing a prosecutor a measured response to a defense opening statement that failed to produce all of the anticipated testimony. The court had only read two cases involving mistrial, neither of which involved facts similar to the case before it, and the court was apparently even unaware of the "manifest necessity" standard, as no reference to that standard was made by either the attorneys or court in the discussion of the mistrial decision.

By not affording the parties an opportunity to research and deliberate the mistrial issues, the court was left to rule, as it candidly acknowledged, "off the top of my head" (*Pet. App., A89*). Under *Washington*, this failure to deliberate must be viewed as a failure to exercise the requisite "sound discretion".

after

II. The State Has Not Produced A Single Federal Or State Appellate Case Decided Contrary to *Moeck* Involving A Mistrial Granted After The Defense Opening Statement Referred, In Good Faith, To Anticipated, Admissible Testimony By The Defendant That Was Not Ultimately Produced.

This court should deny review because no conflict exists among the federal appellate courts or among the States with regard to the specific question presented in Moeck's case: whether the trial court failed to exercise "sound discretion" in granting a mistrial in a case in which the defense opening argument summarized, in good faith, the anticipated testimony of the defendant and where the defendant ultimately decided to not testify. The State has never, though all levels of litigation in the Wisconsin courts and now in its petition to this Court, produced a *single* federal or state appellate case that has upheld the grant of a mistrial based on a defense opening statement that summarized, in good faith, the anticipated, admissible testimony of a witness and where the defense then failed to called that witness. Every case that has addressed the question has concluded, consistent with *Moeck*, that a mistrial is not warranted under such circumstances. *United States v. Sloan*, 36 F.3d 386 (4th Cir. 1994)("manifest necessity" for a mistrial not established where defense counsel's opening statement provided a "Horatio Alger-like" account of defendant's life but testimony from the defendant was not presented to support such statements); *Spaziano v. State*, 429 So.2d 1344 (Fla. App.2 Dist. 1983) ("manifest necessity" for a mistrial not established when attorney in good faith expects his client to testify and gives an opening statement on the basis of that expectation). Simply put, no conflict exists between the Wisconsin Supreme Court's decision in *Moeck* and any other case

anywhere, federal or state, on this question. Review by this court, therefore, is not warranted.

The petitioner attempts to conjure up a "conflict" between the federal courts and between the States with regard to the level of deference to be accorded a trial court's mistrial decision. The various levels of deference that appellate courts have accorded to mistrial decisions, however, is precisely what this Court required in *Arizona v. Washington*. In *Washington*, the Court recognized that mistrial decisions and the appellate review of mistrial decisions are highly fact-specific, that there exists "a spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny." *Washington*, 434 U.S. at 510. Some mistrial decisions warrant strict scrutiny, some warrant great deference, and others fall along the line between these two extremes. Thus, it should not be surprising and indeed, it is only to be expected that appellate courts, following *Washington*, will accord varying levels of deference to trial courts' mistrial declarations.

Mistrial declarations are not fungible: each must be assessed on its own merits, with an eye toward preserving both a defendant's fundamental right against double jeopardy and the public interest in fair trials. The petition presents a mishmash of federal and state appellate decisions reviewing mistrials, without any effort to identify or explain the underlying facts of the cases which would shed light on where each case should fall on *Washington's* spectrum of deference (*Petition at 14-17*).

III. No Recurring Issue of National Importance Is Presented.

Petitioner argues that review is necessary to address a recurring issue of national importance. Petitioner's argument is based on the faulty premise that the "issue presented" involves mistrials based on defense errors. As explained above, while continuing to insist that this case involves an improper defense opening statement, the petitioner fails to present *any* authority, State or federal, in support of that view. The Wisconsin Supreme Court correctly determined that Moeck's case does not involve a "bad faith" opening argument, and the State has never asserted that it does involve "bad faith". This Court should not grant review to address a question not presented by the facts of the case for which review is granted.

CONCLUSION

For the reasons set forth above, the State has not articulated any compelling reason justifying this Court's discretionary review. Moeck has now served more than 5 years in prison in violation of his fundamental rights against double jeopardy. Moeck respectfully requests this Court to deny the State's Petition for Writ of Certiorari to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted this 27th day of September, 2005.

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In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

RICHARD A. MOECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 05-182

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

RICHARD A. MOECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

There are compelling institutional considerations at stake when an appellate court fails to give "special respect" to a trial judge's declaration of a mistrial in response to an improper opening statement by defense counsel that jeopardizes the State's right to a fair trial by an impartial jury. That high degree of deference is necessary, this Court said in *Arizona v. Washington*, 434 U.S. 497 (1978), because appellate second-guessing discourages mistrial declarations even when the trial judge fears a fair trial by an impartial jury has been compromised. The trial judge knows that a wrong judgment call (a) could result in an unjust acquittal

that cannot be reversed even if a mistrial should have been declared in hindsight, or (b) could allow a defendant found guilty on retrial to walk free if an appellate court concludes a mistrial should not have been declared in hindsight.

The Wisconsin Supreme Court failed to abide by the rule adopted in *Arizona v. Washington* and instead second-guessed a trial judge's reasonable exercise of discretion. In doing so, the Wisconsin Supreme Court exacerbated a conflict among the courts over the meaning and application of that decision. Moreover, Wisconsin prosecutors will now be reluctant to request mistrials even when they should, and trial judges will be reluctant to exercise discretion in favor of mistrials even when they should. The result will be unjust acquittals by tainted juries for which the State has no recourse. This scenario would defeat "the ends of public justice." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

Moeck's Brief in Opposition ("Br. in Opp.") utterly ignores the policy concerns underlying *Arizona v. Washington*, misstates the holding of that case, and concedes the existence of a conflict. Certiorari is warranted for the reasons set forth in the Petition.

I. STATE AND FEDERAL COURTS ARE DIVIDED AS TO THE DEGREE OF DEFERENCE OWED A MISTRIAL DECLARATION IN THE FACE OF DEFENSE MISCONDUCT.

Moeck concedes that there are "various levels of deference that appellate courts have accorded to mistrial decisions." Br. in Opp. at 37. That is precisely why this Court's review is urgently needed. The standard of appellate review of a mistrial declared in response to defense error was

seemingly resolved by *Arizona v. Washington*, yet confusion persists among the lower courts. As pointed out by the State, some appellate courts review the question of "manifest necessity" *de novo*. Others treat the issue as a mixed law and fact question with the legal component being subject to *de novo* review. Still others give great deference to the trial judge's exercise of discretion as, the State submits, this Court in *Arizona v. Washington* intended. *See* Pet. 14-21.

Moeck's only response is to assert that none of the cases cited by the State reached the result advocated by the State here, *i.e.*, upheld the declaration of a mistrial in response to improper opening statements by defense counsel. Br. in Opp. at 36. Not true. Several of the cases cited in the Petition faithfully adhered to *Arizona v. Washington* and deferred to trial court mistrial declarations under similar circumstances. *See* Pet. 17-18 & n.4.[1]

Moreover, the Brief in Opposition inadvertently highlights the conflict among the courts through its assertion (Br. in Opp. at 20-28) that the appellate deference mandated by *Arizona v. Washington* only applies to defense counsel error made in bad faith. We explain in § II, *infra*, why that assertion is incorrect. What matters for present purposes is that a split of authority has developed on whether the good or bad faith of defense counsel is a relevant factor in assessing the need for a mistrial.[2]

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[1] *See, e.g., Tubbs v. State*, 583 S.E.2d 853, 857-58 (Ga. 2003); *Grimes v. McAnulty*, 957 S.W.2d 223, 224-25 (Ky. 1997); *Lovett v. Commonwealth*, 472 N.E.2d 236, 238-39 (Mass. 1984); *State v. Levison*, 510 N.W.2d 495, 497-500 (Neb. Ct. App. 1993). *Also see State v. Colvin*, No. 04AP-421, 2005 WL 704818, *9-*10 (Ohio Ct. App. March 29, 2005) (upholding mistrial declared in response to improper defense closing argument).

[2] A number of courts consider the good or bad faith of defense counsel to be relevant. *See United States v. Sloan*, 36 F.3d 386, 397-400

(footnote continued)

II. THE WISCONSIN SUPREME COURT FAILED TO APPLY THE DEFERENTIAL STANDARD OF REVIEW REQUIRED BY *ARIZONA V. WASHINGTON.*

Arizona v. Washington made clear that the "highest degree of respect," that is, "special respect," must be given a trial judge's mistrial declaration. 434 U.S. at 510-11. This is the same "great deference," *id.* at 514, to which mistrial declarations based on hung juries are entitled, and is designed to prevent appellate courts from second-guessing discretionary mistrial judgments made by trial judges. *Id.* at

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(4th Cir. 1994) (defendant did not testify after counsel presented a "Horatio Alger" story of his life in opening statements; no "manifest necessity" because counsel acted in good faith and the jury could be instructed to disregard the story); *Jackson v. State*, 855 So. 2d 178, 180 (Fla. Dist. Ct. App. 2003); *Quinones v. State*, 766 So. 2d 1165, 1170-71 (Fla. Dist. Ct. App. 2000); *Spaziano v. State*, 429 So. 2d 1344, 1346 (Fla. Dist. Ct. App. 1983) (defense attorneys have the right to summarize the defendant's anticipated testimony and then, absent bad faith, change strategy and not put him on the stand; the instruction that opening statements are not evidence will remedy the situation). S*ee also Johnson v. Karnes*, 198 F.3d 589, 596-97 (6th Cir. 1999) (defense counsel in good faith believed he had a legitimate basis for asking the erroneous questions, the prosecutor objected but did not ask for a mistrial at first, and the prosecutor warned the trial court about double jeopardy ramifications of a mistrial).

Other courts focus on the potential adverse impact of the defense error on the ability of the jury to render a fair and impartial verdict. *See United States v. Shaw*, 829 F.2d 714, 718-20 (9th Cir. 1987) (an improper defense opening statement can create a "manifest necessity" if it creates a potential for jury bias); *Tubbs v. State*, 583 S.E.2d at 857-58; *Sinkfield v. State*, 458 S.E.2d 664, 665 (Ga. Ct. App. 1995) (improper questions of a witness by defense counsel, even if asked in good faith, supported mistrial declaration); *Grimes v. McAnulty*, 957 S.W.2d at 224-25; *Lovett v. Commonwealth*, 472 N.E.2d at 238-39; *State v. Levison*, 510 N.W.2d at 499-500; *Haight v. State*, 533 S.W.2d 510, 512 (Ark. 1976).

509-10. Absent such deferential review, the bar of double jeopardy would award defendants the windfall of no further prosecution for their alleged crimes. In this case, Moeck received precisely that windfall, based on nothing more than the Wisconsin Supreme Court's conclusion—applying essentially *de novo* review—that the trial judge need not have declared a mistrial. As demonstrated in the Petition (at 9-13), the court's decision amounted to a blatant disregard of the dictates of *Arizona v. Washington*. Moeck responds in a variety of ways, none of which has merit.

1. Moeck argues that "the Wisconsin Court determined that the trial court erred as a matter of law in concluding that the prosecutor would be unable to effectively countermand the defense opening statement." Br. in Opp. at 16. The Wisconsin Supreme Court was not, in fact, criticizing the trial judge for making an error of *law*; it was criticizing the trial judge for making an error of *judgment* or *discretion*. The Wisconsin Supreme Court agreed with the trial judge that (1) the opening statement was flawed; (2) the jury's misperceptions caused by the opening statement needed to be corrected; and (3) Fifth Amendment concerns limited, to an extent, the prosecutor's ability to eliminate juror bias in her closing arguments. Pet. App. A20-21, ¶¶62-63; A22, ¶¶67-68; A24, ¶74. *Also see id.* at A26, ¶77 n.47.

The only disagreement the Wisconsin Supreme Court had with the trial judge was over whether the prosecutor's closing argument and any curative instructions would satisfactorily cure the jury's misperceptions. That is precisely the type of judgment call *Arizona v. Washington* instructs must be given "special respect" by appellate courts. 434 U.S. at 510. The lesson of *Arizona v. Washington* is that the trial judge is in a far better position to make that judgment call as to the proper remedy for curing jury bias than is an appellate court.

To be sure, as Moeck asserts (Br. in Opp. at 13-14), this Court in *Arizona v. Washington* instructed appellate courts to review whether the trial judge exercised "sound discretion." 434 U.S. at 514. But the Court almost immediately thereafter explained that a trial judge fails to exercise "sound discretion" only when he or she acts "irrationally or irresponsibly," *id.* at 514, words perfectly consistent with granting trial judges a high degree of deference. Indeed, to read the opinion any other way would render it meaningless. Surely, the reference in *Arizona v. Washington* to "sound discretion" did not convert the highly deferential review mandated earlier in the opinion into virtually *de novo* review, where the appeals court simply substitutes its judgment for that of the trial judge in the name of "sound discretion."

It should be plain that the Wisconsin Supreme Court did not give "special respect" or any deference whatsoever to the trial judge's sound exercise of discretion. The court's analysis reveals that, while it paid lip-service to *Arizona v. Washington*'s principles, it launched into full independent record review for reasons to undermine, rather than uphold, the trial judge's sound exercise of discretion.

2. Moeck devotes considerable space to arguing that the rule announced in *Arizona v. Washington* is limited to cases where, unlike here, defense counsel presented the offending opening statement in bad faith. Br. in Opp. at 20-28. That is a manifestly erroneous reading of *Arizona v. Washington*, which teaches that the good or bad faith of defense counsel is irrelevant. The only issue is whether the offending opening statement adversely affected the State's right to a fair trial by an impartial jury. 434 U.S. at 510-13. *See also id.* at 513 n.32 (giving deference to trial judge's exercise of discretion in assessing potential jury bias "is not intended as a comment upon the conduct of defense counsel in this case").

This Court equated the declaration of a mistrial in response to improper opening statements by defense counsel with the declaration of a mistrial caused by a deadlocked jury. 434 U.S. at 509-10. Just as a deadlocked jury is usually no one's fault, the motive behind an unsubstantiated opening statement is beside the point when a trial judge is faced with assessing its impact on the right to a fair trial by an impartial jury.

3. Moeck attempts to distinguish *Arizona v. Washington* on the further ground that, in contrast to that case, here defense counsel did nothing wrong in his opening statement. Br. in Opp. 22-28. In Moeck's view, it is perfectly proper for a defense attorney to promise his client's testimony, summarize that testimony in great detail, contrast it with the victim's account, and then fail to present any evidence at trial to support that summary. This argument does not withstand even cursory scrutiny.

Critically, the Wisconsin Supreme Court did not agree with Moeck that this was a proper opening statement. Both the majority and the dissent recognized that defense counsel created a problem at trial that had to be remedied in order to protect the State's right to a fair trial by an impartial jury. Pet. App. A22, ¶68 (as a matter of state law, a mistrial can be declared "on the basis of an opening statement that summarizes evidence that is not produced"); A28-29, ¶¶82-83 (Wilcox, J., dissenting); A58-62, ¶¶165-76 (Prosser J., dissenting). They disagreed only as to whether the trial judge's mistrial order was an appropriate remedy. That fully disposes of Moeck's argument. *See Arizona v. Washington*, 434 U.S. at 511 (rejecting the defendant's assertion that the opening statement at issue was proper, holding that this argument was foreclosed by "the state court's interpretation of its own law").

Moeck relies on *Frazier v. Cupp*, 394 U.S. 731 (1969), for the proposition that a mistrial can never be based on an improper opening statement absent bad faith by defense counsel. Br. in Opp. at 20-26. That is an absurd proposition which, not surprisingly, this Court did *not* adopt in *Frazier*. The Court simply held that the prosecutor's brief reference in opening statements to the anticipated testimony of a codefendant who never testified did not justify reversal of petitioner's conviction. 394 U.S. at 733-37. That is all.

In the end, Moeck himself concedes the problem his improper opening statement created:

> Petitioner notes, correctly, that when defense counsel summarizes the anticipated, admissible testimony of the defendant in opening statement, but then fails to produce that testimony, the defense can be devastated, resulting in "compelling ineffective assistance of counsel challenges" on appeal (*Pet. at 26*).

Br. in Opp. at 27.

Conduct by defense counsel that might lead to reversal following a conviction is without question the sort of conduct that can create a manifest necessity for a mistrial. After all, "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached *but would have to be reversed on appeal due to an obvious procedural error in the trial*." *Illinois v. Somerville*, 410 U.S. 458, 464 (1973) (emphasis added).

Moreover, Moeck acknowledges, at page 28 of his brief, that his opening statement risked biasing the jury against both the State and the defense.

Defense counsel's opening statement became flawed once Moeck decided not to testify. This flaw had to be remedied. The remedy was complicated by legitimate Fifth Amendment concerns because the prosecutor could not directly or indirectly comment on Moeck's refusal to testify. The fundamental issue raised by this case is who decides upon the appropriate remedy. This Court in *Arizona v. Washington* placed that judgment call squarely in the hands of this nation's trial judges because they are in the best position to evaluate the impact of the defense error on the State's right to a fair trial by an impartial jury. *Arizona v. Washington*, 434 U.S. at 513-14. The Wisconsin Supreme Court and a number of other lower courts do not trust trial judges to make that difficult judgment call.

4. While insisting that his attorney was blameless and acting in good faith, Moeck ascribes sinister motives to the prosecutor here. Moeck believes that the prosecutor wanted to abort the trial because she knew the State's case was going badly. Br. in Opp. at 29-32. Whether or not that self-serving characterization of the trial is correct (and it is not) is beside the point. Neither the trial court, the Wisconsin Court of Appeals, nor the Wisconsin Supreme Court found that the prosecutor was motivated by anything other than a sincere desire to protect the State's right to a fair trial by an unbiased jury. If Moeck believes the case was "going badly" for the State, it was due largely to counsel's improper opening statement putting Moeck's unsworn and uncross-examined testimony before the jury. It was reasonable for the trial judge to abort this trial not because the State might lose, but because it might lose unfairly and without recourse.[3]

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[3] Moeck's reference to an alleged post-trial hearsay statement by an investigating officer, Br. in Opp. at 11, 30-31, was never proven by him and is vehemently denied by the State. It is entitled to no weight.

Moeck's theories about the prosecutor's motives have no bearing on whether the Wisconsin Supreme Court abided by this Court's decision in *Arizona v. Washington* (it did not), and on whether the lower courts are divided over the meaning and application of that decision (they are).

CONCLUSION

This Court should grant certiorari and reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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